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n97. See Tayyari v. New Mexico State Univ., 495 F. Supp. 1365, 1377 (D.N.M. 1980) (holding that decision by a state university to deny admission to Iranian students was preempted); Bethlehem Steel Corp. v. Board of Comm'rs, 80 Cal. Rptr. 800 (App. Dep't Super. Ct. 1969) (holding that state buy-American statute was preempted); Springfield Rare Coin Galleries, Inc. v. Johnson, 503 N.E.2d 300, 305 (Ill. 1986) (holding that state's expulsion of South Africa from a legal currency tax-exempt list was preempted); New York Times Co. v. City of New York Comm'n on Human Rights, 361 N.E.2d 963, 968 (N.Y. 1977) (holding that municipalities' ban on employment advertising by South African companies was preempted). In addition, several lower courts have struck down state inheritance statutes similar to the one at issue in Zschernig. See Harold G. Maier, The Bases and Range of Federal Common Law in Private International Matters, 5 Vand. J. Transnat'l L. 133, 141-45 (1971) (citing and analyzing cases); cf. Clark v. Allen, 331 U.S. 503, 517 (1947) (holding that state laws with "incidental or indirect effect" on foreign relations were not preempted).

n98. See, e.g., Patrick J. Borchers & Paul F. Dauer, Taming the New Breed of Nuclear Free Zone Ordinances: Statutory and Constitutional Infirmities in Local Procurement Ordinances Blacklisting the Producers of Nuclear Weapons Components, 40 Hastings L.J. 87 (1988); Howard N. Fenton, III, The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions, 13 Nw. J. Int'l L. & Bus. 563, 588-90 (1993); Michael A. Olivas, Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications, 35 Va. J. Int'l L., 217, 219-20 (1994).

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4.

Customary International Law

The final area in which the federal common law of foreign relations has been applied concerns customary international law. Customary international law is the law of the international community that "results from a general and consistent practice of states followed by them from a sense of legal obligation." n99 In contrast to treaties, customary international law is not mentioned in either the Supremacy Clause or Article III. n100 For most of our nation's history, customary international law had the status of nonfederal general common law. n101 During this period it did not implicate federal question jurisdiction and did not [*1640] bind the states as federal law. n102 In recent years, however, courts and commentators have come to agree that customary international law applies as domestic federal common law. n103 A primary rationale for this view is that "the determination and application of international law are integral to the conduct of foreign relations and are the responsibility of the federal government." n104

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n99. Restatement (Third) of the Foreign Relations Law of the United States 102(2) (1987).

n100. The Constitution's only mention of customary international law is in Article I, which gives Congress the power to "define and punish...Offences against the Law of Nations." U.S. Const. art. I, 8, cl. 10.

n101. See Curtis A. Bradley & Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815, 824-26, 849-52 (1997).

n102. See id. at 824.

n103. See id. at 817 nn.3-4, 837 nn.150-151 (collecting sources). For a critique of this view, see id. at 849-70; Curtis A. Bradley & Jack L. Goldsmith, The Current Illegitimacy of International Human Rights Litigation in United States Courts, 65 Fordham L. Rev. (forthcoming 1997).

n104. Henkin, supra note 1, at 238.

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The judicial federalization of customary international law is particularly significant because of changes in the content of that law in recent years. Prior to World War II, customary international law primarily governed relations among nations. n105 Since World War II, it has expanded to govern certain human rights issues that involve a nation's treatment of its own citizens (such as torture, prolonged arbitrary detention, and some forms of discrimination). n106 While the political branches have incorporated much of the traditional customary international law relevant to domestic litigation into domestic law via treaty or statute, they have not incorporated most of this "new" customary international law of human rights. n107 Even in the absence of such political branch incorporation, however, the modern view is that customary international law applies as federal law by virtue of the federal common law of foreign relations. n108

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n105. Mark W. Janis, An Introduction to International Law 245 (2d ed. 1993).

n106. On the content of this new human rights law, and the general trend it represents in international law, see Bradley & Goldsmith, supra note 101, at 838-42; Rosalyn Higgins, Conceptual Thinking About the Individual in International Law, 24 N.Y.L. Sch. L. Rev. 11 (1978); Louis B. Sohn, The New International Law: Protection of the Rights of Individuals Rather Than States, 32 Am. U. L. Rev. 1 (1982).

n107. See Bradley & Goldsmith, supra note 101, at 869; Bradley & Goldsmith, supra note 103.

n108. See Bradley & Goldsmith, supra note 101, at 837 nn.150-51 (collecting sources).

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To date, courts have treated customary international law as federal common law primarily to establish Article III federal question jurisdiction in international human rights cases. n109 But as many commentators have argued,

if customary international [*1641] law is federal common law, it binds the states under the Supremacy Clause. n110 On this view, a state law that is consistent with federal statutes and the federal Constitution would nonetheless be invalid if inconsistent with customary international law. This is a potentially significant development, for customary international law is often more protective of individual rights than federal or state constitutions and statutes. The possibilities for preemption under this rationale range from state juvenile death penalty statutes to state restrictions on welfare benefits to aliens to state choice-of-law rules. n111 As the scope of customary international law continues to grow (and in the human rights context there is every indication that it will n112), so too will the areas of state law potentially subject to preemption under a federal common law of foreign relations rationale.

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n109. See id. at 873.

n110. See, e.g., Restatement (Third) of the Foreign Relations Law of the United States 111 (1987); Brilmayer, supra note 14, at 295, 302-04; Louis Henkin, International Law as Law in the United States, 82 Mich. L. Rev. 1555, 1561-63 (1984).

n111. See Bradley & Goldsmith, supra note 101, at 846-47; Brilmayer, supra note 14, at 315-26.

n112. See, e.g., Restatement (Third) of the Foreign Relations Law of the United States 702 cmt. a (1987); Theodor Meron, Human Rights and Humanitarian Norms as Customary Law 99 (1989); Richard B. Lillich, The Growing Importance of Customary International Human Rights Law, 25 Ga. J. Int'l & Comp. L. 1, 7 n.43 (1995-1996).

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In sum, since Sabbatino and Zschernig, courts have begun to apply the federal common law of foreign relations to preempt otherwise applicable state law in a variety of contexts. In each of these contexts, federal judicial lawmaking is premised on an independent judicial assessment of the foreign relations implications of applying state law. Such lawmaking requires courts, in the absence of political branch guidance, to identify, weigh, and accommodate the foreign relations interests of the United States. This method and many of its consequences have received the broad approval of commentators.

## II.

## The Lesson of History

The central premise of the federal common law of foreign relations is that the Constitution's assignment of foreign relations powers to the federal government entails a self-executing exclu- [*1642] sion of state authority. n113 The basis for this view is surprisingly uncertain. Constitutional text is at best

equivocal. Articles I and II assign to the federal political branches numerous executory foreign relations powers, and Article I, Section 10 excludes state authority in a defined set of foreign relations contexts. n114 The most natural inference from these provisions and from the Constitution's enumerated powers structure is that all foreign relations matters not excluded by Article I, Section 10 fall within the concurrent power of the state and federal governments until preempted by federal statute or treaty. n115

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n113. See supra note 54 and accompanying text.

n114. See supra notes 2-3.

n115. See Clark, supra note 62, at 1296.

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The inconclusiveness of constitutional text leads proponents of the federal common law of foreign relations to emphasize other matters. This Part considers the historical claims most often made in support of the doctrine. Some courts and commentators infer from the text of the Constitution that the framers intended all foreign relations powers to be vested exclusively in the federal government. n116 They bolster this inference with the framers' well-known desire to establish federal control over foreign relations, n117 as well as numerous nineteenth- and twentieth-century Supreme Court decisions proclaiming foreign relations to be an exclusive federal prerogative. n118

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n116. See, e.g., Sabbatino, 376 U.S. at 427 & n.25; Clark, supra note 62, at 1296-99; Moore, supra note 80, at 275-76; Peter J. Spiro, The Limits of Federalism in Foreign Policymaking, Intergovernmental Persp., Spring 1990, at 32, 34.

n117. See, e.g., The Federalist No. 42, at 279 (James Madison) (Jacob E. Cooke ed., 1961) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations."); The Federalist No. 80, at 535-36 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("The peace of the WHOLE ought not be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members."); Letter from Thomas Jefferson to James Madison (Feb. 8, 1786), in 1 The Republic of Letters: The Correspondence between Thomas Jefferson and James Madison 1776-1826, at 409, 410 (James Morton Smith ed., 1995) (considering it "indispensably necessary that with respect to every thing external we be one nation only, firmly hooped together").

n118. See, e.g., United States v. Pink, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively."); Hines v. Davidowitz, 312 U.S. 52, 63 (1941) ("The Federal Government...is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties."); United States v. Belmont, 301 U.S. 324, 331 (1937) ("In respect of our foreign relations generally, state lines disappear. As to such purposes the State... does not exist."); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 316 (1936) ("Since the

states severally never possessed international powers, such powers could not have been carved from the mass of state powers."); The Chinese Exclusion Case, 130 U.S. 581, 606 (1889) ("For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.").

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This Part explains why reliance on these sources is misplaced. The Constitution was designed to give the federal political branches comprehensive control over U.S. foreign relations, and from the beginning, the Supreme Court upheld foreign relations enactments against federalism challenges. But outside of Article I, Section 10, there is no evidence that the Constitution was designed to establish a judicially enforceable, self-executing realm of federal exclusivity in foreign affairs, and for the first 175 years of the nation, courts did not recognize any such realm. After showing that constitutional practice prior to 1964 did not support the innovations in Sabbatino and Zschernig, I explain why this historical practice does not necessarily undermine the modern practice. For as this Part also explains, many of the reasons for the absence of a federal common law of foreign relations prior to 1964 had changed by that date.

A.

Evidence

One of the primary and least controversial purposes of the Constitutional Convention was to strengthen the foreign relations powers of the federal government vis-a-vis the states. n119 The Articles of Confederation lacked an effective supremacy clause, executive, or judiciary, and Congress lacked adequate power to raise revenue or to control the states in foreign relations. As a result, the states often pursued their own interests in a manner that undermined the collective national interest in military security, a unified international trade policy, and diplomatic respect. Individual states lacked the means (and often the motivation) to protect against external security threats, but the absence of a federal taxing power prevented Congress from [*1644] maintaining the national military needed to redress such threats. In addition, debtor states had little incentive to comply with the obligation imposed by the 1783 Treaty of Paris to pay prewar debts to British creditors, and Congress lacked the means to force them to do so. In turn, England refused to honor its treaty obligations, further exacerbating the military and economic insecurity of the new nation. More broadly, state noncompliance with national treaty obligations undermined the national government's ability to bargain effectively with foreign nations. Similarly, Congress could not prevent the states from pursuing their own commercial policies with foreign nations, and thus could not threaten other nations with the weapons of commercial warfare. It also lacked the authority to enforce compliance with the law of nations by, for example, punishing affronts to foreign diplomats.

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n119. This paragraph draws on Frederick W. Marks III, Independence on Trial: Foreign Affairs and the Making of the Constitution (1973); 1 Bradford Perkins, The Cambridge History of American Foreign Relations: The Creation of a Republican Empire, 1776-1865, at 54-80 (1993); Jack N. Rakove, The Beginnings of National Politics: An Interpretive History of the Continental Congress 342-52 (1979).

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I have already outlined how the Constitution rectified these and other foreign relations collective action problems under the Articles of Confederation. n120 It did not do so, as popular lore would have it, by giving the federal government exclusive power in the foreign relations field. Article I, Section 10 did make certain traditional foreign relations functions at least presumptively exclusive. But the foreign relations provisions of Article I, Section 10 were borrowed directly from the Articles of Confederation. n121 With trivial exceptions, Article I, Section 10 did not impose new limitations on the states. Nor did it purport to bar states from participating in all foreign relations-related functions. Instead, the Constitution's primary innovations to control states [*1645] in foreign relations were (a) to give the federal political branches, including the new President, broader foreign relations powers that were easier to exercise, and (b) to create a more powerful Supremacy Clause, a federal judiciary, and a President with executive power. Taken together, these mechanisms ensured state compliance with the political branches' foreign relations enactments. But they left the determination of when the national foreign relations interest would be best served by the exclusion of state power largely to the discretion of the federal political branches.

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n120. See supra notes 2-5 and accompanying text.

n121. Compare U.S. Const. art. I, 10, with U.S. Articles of Confederation art. VI. Article VI of the Articles of Confederation, like Article I, Section 10 of the Constitution, prohibited states, without consent of Congress, from entering into agreements with foreign nations, from engaging in war, from keeping troops or ships of war in times of peace, and from issuing letters of marque and reprisal. There were also some minor differences between the two provisions. Article I, Section 10 of the Constitution placed an absolute ban on treaty-making by states; Article VI of the Articles prohibited treaty-making by states without prior congressional consent. Article I, Section 10 prohibited states from laying imposts or duties without congressional consent unless "absolutely necessary for executing it's [sic] inspection Laws"; Article VI's prohibition on state imposts and duties was limited to those that interfered with certain treaty stipulations. Finally, the Constitution did not replicate Article VI's prohibition on states from "sending any embassy to, or receiving any embassy from," a foreign state without congressional consent.

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This discretion is conditioned on the satisfaction of procedural hurdles that make it costly and difficult for the political branches to make foreign relations law. n122 A primary purpose for the establishment of these hurdles - especially with respect to treaties - was to preserve state influence and protect state interests. n123 Under the original Constitution, state

legislatures retained indirect control over the making of treaties and appointment of ambassadors through their power to select Senators. n124 The nineteenth and early twentieth centuries are replete with examples of states acting "within the federal system to constrain or influence the national government's conduct of foreign affairs." n125 Numerous treaties and foreign relations statutes were blocked, or limited in scope, out of concern for state prerogatives. n126 In addition, as I shall discuss more fully in a moment, during much of the nineteenth century, states played a significant role in im- [*1646] migration and (for a shorter period) extradition. Even military control was not an exclusive federal prerogative as an original matter. States originally retained the responsibility for training and officering the militia, the primary military force in the United States until after the War of 1812. n127

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n122. Foreign relations statute-making is subject to the bicameral, presentment, and veto requirements to which all statute-making is subject. See U.S. Const. art. I, 7. Treaty-making has its own procedural requirements as well: treaty-making by the President, subject to consent by two-thirds of the Senate, see id. art. II, 2; and implementing legislation by the Congress when treaties are non-self-executing.

n123. See Arthur Bestor, Respective Roles of Senate and President in the Making and Abrogation of Treaties - The Original Intent of the Framers of the Constitution Historically Examined, 55 Wash. L. Rev. 1 (1979); Jack N. Rakove, Solving a Constitutional Puzzle: The Treatymaking Clause as a Case Study, 1 Persps. in Am. Hist. 233, 236-250 (1984); John C. Yoo, The Original Understanding of the Treaty Clause (unpublished manuscript, on file with the Virginia Law Review Association).

n124. U.S. Const. art. I, 3, cl. 1, amended by U.S. Const. amend. XVII (1913).

n125. Kline, supra note 92, at 19.

n126. For many examples, see Nicholas Pendleton Mitchell, State Interests in American Treaties (1936); Harold W. Stoke, The Foreign Relations of the Federal State 175-218 (1931).

n127. See William H. Riker, Federalism: Origin, Operation, Significance 57-60 (1964). The original Constitution contained other limitations on the federal government's foreign relations power vis-a-vis the states. U.S. Const. art. I, 9, cl. 1 (prohibiting Congress from restricting prior to 1808 the migration or importation of persons admitted by states); id. art. I, 9, cl. 5 (prohibiting Congress from taxing or laying duty on articles exported from states); id. art. I, 9, cl. 6 (prohibiting Congress from giving preference to ports of one state over another or obliging vessels to enter, clear, or pay duties in any state).

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State influences over the conduct of federal foreign relations were also reflected in the debate about whether the political branches' foreign relations powers were limited by the states' reserved powers. This issue was most vigorously debated in the treaty context. n128 The Supreme Court never

declared a treaty unconstitutional on this (or any other) ground. n129 But its dicta sometimes suggested, and commentators and governmental officials often agreed, that the treaty power was limited by states' rights. n130 The Court finally resolved the issue in Missouri v. [*1647] Holland, n131 which held in 1920 that there were no reserved power limitations on the scope of the treaty power. n132 A related question throughout the period was whether the federal government's enumerated foreign relations powers contained gaps. The Supreme Court resolved this question, too, in favor of national power. It did so in large part through broad implications from specific enumerations. n133 In addition, after the Civil War, the Court recognized that some federal foreign relations powers flowed not from enumerated constitutional powers, but rather from nationhood and sovereignty. n134

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n128. For an overview, see Quincy Wright, The Control of American Foreign Relations 88-93 (1922).

n129. Henkin, supra note 1, at 185.

n130. Justice Samuel Chase suggested in 1796 that the federal treaty power was plenary, Ware v. Hylton, 3 U.S. (3 Dall.) 199, 235-237 (1796), but subsequent Supreme Court dicta suggested the contrary. See, e.g., License Cases, 46 U.S. (5 How.) 504, 613 (1847); see generally Henry St. George Tucker, Limitations on the Treaty-Making Power 44-55 (1915) (collecting additional cases). In fact, the federal government has sometimes declined to participate in treaty negotiations or accede to treaty provisions on the ground that such issues were beyond federal power. See Mitchell, supra note 126; Stoke, supra note 126, at 90-91; Kurt H. Nadelmann, Ignored State Interests: The Federal Government and International Efforts to Unify Rules of Private Law, 102 U. Pa. L. Rev. 323, 324 (1954). There was a spirited debate about the scope of the treaty power early in this century. For the states-rights perspective, see Tucker, supra; Ralston Hayden, The States' Rights Doctrine and the Treaty-Making Power, 22 Am. Hist. Rev. 566 (1917); William E. Mikell, The Extent of the Treaty-Making Power of the President and Senate of the United States (pt. 2), 57 U. Pa. L. Rev. 528 (1909). For nationalist perspectives, see Charles Henry Butler, The Treaty-Making Power of the United States (1902); Edward S. Corwin, National Supremacy: Treaty Power vs. State Power (1913); Chandler P. Anderson, The Extent and Limitations of the Treaty-Making Power under the Constitution, 1 Am. J. Int'l L. 636, 636 (1907); Arthur K. Kuhn, The Treaty-Making Power and the Reserved Sovereignty of the States, 7 Colum. L. Rev. 172, 173 (1907).

n131. 252 U.S. 416 (1920).

n132. Id. at 432-35. Holland held only that the "invisible radiation from...the Tenth Amendment" did not limit the treaty power. Id. at 434. It suggested, however, that the treaty power might be limited by other constitutional provisions. Id. at 432-33. The Bill of Rights appears to be one such limitation. See Reid v. Covert, 354 U.S. 1, 5-6 (1957) (plurality opinion). Federalism-related limitations that might survive Hollandinclude the republican government guarantee and the integrity of state territory. See Louis Henkin, Arms Control and Inspection in American Law 172 n.15, 177 n.30 (1958).

n133. For example, the Court at one time inferred the federal power to acquire territory from the enumerated powers to make treaties and to declare

war. See American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 541 (1828). Similarly, the Court inferred an executive power to make international agreements binding on the states from the "receive Ambassadors" clause of Article II. See United States v. Belmont, 301 U.S. 324, 330-31 (1937); see also Henkin, supra note 1, at 220-21.

n134. See, e.g., B. Altman & Co. v. United States, 224 U.S. 583, 600-01 (1912) (power to make executive agreements); Fong Yue Ting v. United States, 149 U.S. 698, 705-07 (1893) (power to expel aliens); Jones v. United States, 137 U.S. 202, 212 (1890) (power to acquire territory by discovery and occupation); The Chinese Exclusion Case, 130 U.S. 581, 609 (1889) (power to exclude aliens). Such inherent power arguments were also made in the 1790s in connection with the Alien Act, see David P. Currie, The Constitution in Congress: The Federalist Period, 1789-1801, at 258-59 (1997), and the common law crimes controversy, see Andrew Lenner, A Tale of Two Constitutions: Nationalism in the Federalist Era, 40 Am. J. Legal Hist. 72, 73 (1996).

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These decisions demonstrate that in the nineteenth and early twentieth centuries, the Supreme Court consistently upheld the political branches' exercises of federal foreign relations power against federalism and related enumerated powers challenges. But they do not by themselves speak to the allocation of state and federal power in the absence of a foreign relations enactment by the federal political branches. Did grants of executory federal foreign relations powers entail a check on state foreign relations activity even in the absence of their exercise? Through [*1648] out the nineteenth and early twentieth centuries, the Supreme Court recognized such dormant preemption in other contexts. The famous example is the dormant Commerce Clause. n135 Others include the power to tax federal instrumentalities, n136 the power to enact fugitive slave legislation, n137 and, arguably, the power to naturalize. n138 In addition, even before Eriev. Tompkins, federal courts interpreted the admiralty and interstate dispute heads of federal judicial power in Article III to authorize the development, within these jurisdictions, of a preemptive judge-made federal law. n139

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n135. The origins of the doctrine in the Supreme Court lie in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), but the first "unequivocal example" in the Supreme Court is Case of the State Freight Tax, 82 U.S. (15 Wall.) 232 (1872). See David P. Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789-1888, at 183 n.180 (1985).

n136. See M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 435-36 (1819).

n137. See Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 622-25 (1842).

n138. In Chirac v. Chirac, 15 U.S. (2 Wheat.) 259 (1817), the Court stated: "That the power of naturalization is exclusively in congress does not seem to be, and certainly ought not to be, controverted." Id. at 269. As David Currie has pointed out, this statement was dictum that might have been based on a reading of the pertinent federal statute, which provided that an alien could become a citizen "on the following conditions, and not otherwise." Currie, supra note 135, at 149 & n.196 (quoting Act of Jan. 29, 1795, ch. 20, 1, 1 Stat.

414, 414) (emphasis added); id. at 173, 265. See also Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 593 (1840) (Barbour, J.) (reading Chirac dicta as a "remark then made in relation to a power which had been executed"). This view finds additional support in the fact that before enactment of the 1795 federal naturalization statute, "several courts upheld the right of states to naturalize under their own laws." James H. Ketner, The Development of American Citizenship, 1608-1870, at 250 n.1 (1978) (citing Collet v. Collet, 6 F. Cas. 105 (C.C.D. Pa. 1792) (Wilson and Blair, Circuit Justices; Peters, District Judge) and Portier v. LeRoy, 1 Yeates 371 (Pa. 1794)); see also United States v. Villato, 28 F. Cas. 377, 379 (C.C.D. Pa. 1797) (No. 16,622) (Iredell, J.) (suggesting in dicta that "the power of naturalization operated exclusively, as soon as it was exercised by congress") (emphasis added). Chief Justice Roger Taney's opinion in Dred Scott rejected this view in dicta that stated that the federal naturalization power is self-executing and exclusive with regard to federal citizenship. Dred Scott v. Sandford, 60 U.S. 393, 405-06, 416-18, 422-23 (1857). For some opinions on this question from the framing period, compare The Federalist No. 32, at 201 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (arguing that naturalization power is exclusive because of its uniformity requirement), with id. No. 42, at 287 (James Madison) (arguing that the Constitution authorizes Congress "to establish an uniform rule of naturalization throughout the United States" in order to prevent one state from granting citizenship to an undesirable that other states must respect under Article IV's Privileges and Immunities Clause).

n139. See Southern Pac. Co. v. Jensen, 244 U.S. 205, 215-16 (1917) (admiralty); Kansas v. Colorado, 206 U.S. 46, 95-98 (1907) (interstate disputes).

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[*1649]

There is no general explanation for why courts developed dormant preemption and federal common law doctrines in these contexts and not others. n140 The important point for present purposes is that numerous theories were available had courts seen fit to invoke them in the foreign relations context. n141 But prior to 1964, they did not. Sabbatino and Zschernig were viewed at the time of their announcement to mark a significant break with prior law. Professor Henkin's classic contemporary analyses characterized both Sabbatino and Zschernig as "new" constitutional doctrine. n142 Similarly, Hans Linde viewed Zschernig's dormant foreign relations preemption doctrine to be "without precedent - new constitutional law." n143

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n140. For example, a self-executing exclusion of state authority is not implicit in Congress's bankruptcy power, see Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 193-96 (1819); define and punish power, see United States v. Arjona, 120 U.S. 479, 487 (1887); or copyright and patent power, see Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 478-79 (1974).

n141. One such theory was that dormant preemption was appropriate when "the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress." Sturges, 17 U.S. (4 Wheat.) at 193 (dictum) (emphasis added). See also The Federalist No. 32, at 200-01 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (same). Another theory

was that states lacked power that they did not possess prior to the Constitution. See, e.g., 1 Joseph Story, Commentaries on the Constitution of the United States 626-27, at 434-35 (Boston, Little, Brown, 3d ed. 1858). Yet another theory was that dormant preemption was appropriate when federal uniformity was needed. See The Federalist No. 32 (Alexander Hamilton).

n142. Louis Henkin, Foreign Affairs and the Constitution 239 (1972); Henkin, supra note 41, at 806. Professor Louis Henkin's apparent belief that both decisions were unprecedented flows from his view that Sabbatino announced a legislative power in courts while Zschernig announced a species of dormant constitutional preemption. As explained supra notes 53-60 and accompanying text, however, the doctrines are functionally identical.

n143. Hans A. Linde, A New Foreign-Relations Restraint on American States: Zschernig v. Miller, 28 Zeitschrift f<um u>r Ausl<um a>ndisches <um O>ffentliches Recht und V<um o>lkerrecht 594, 603 (1968). Hans Linde viewed a preemptive federal judicial lawmaking power as a mere "implication" in Sabbatino. Id.

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The perceptions of Sabbatino and Zschernig as constitutional novelties might seem surprising in light of the many nineteenth-and twentieth-century statements about the exclusivity of the federal foreign relations power. But federal exclusivity by virtue of a judicially enforced dormant preemption should not be confounded with federal exclusivity by virtue of either (a) the [*1650] political branches' occupation of the field through treaty and statute, or (b) independent constitutional prohibitions. The latter two grounds served as a basis for federal exclusivity in the period before 1964. But they did not amount to a federal common law of foreign relations.

Consider extradition, the context in which courts came closest to recognizing something akin to dormant foreign affairs preemption. During the first half of the nineteenth century, "extradition was practised by some of the States, which made and granted demands for the surrender of fugitive criminals in international cases." n144 A lack of federal question jurisdiction famously prevented the Supreme Court from deciding the constitutional merits of this practice in its 1840 decision, Holmes v. Jennison. n145 Chief Justice Roger Taney, in his opinion for four Justices to uphold jurisdiction, reasoned that Vermont's attempted extradition of the plaintiff in error to Canada was a foreign compact prohibited by Article I, Section 10. n146 He also argued in the alternative that the extradition power was exclusively federal, although he did not make clear whether this was because of dormant preemption or because the absence of federal extradition treaties constituted the affirmative "policy of the general government." n147 In contrast, the four other participating Justices all rejected the [*1651] dormant preemption argument. n148 The practice of state extradition waned in the decades after Holmes as the federal government began to regulate extradition by treaty and statute, and as Taney's Holmes opinion rose to orthodoxy. n149 By the turn of the century, it seemed clear that the extradition power was exclusive even in the absence of federal enactments, although it was never established whether this was so because of the Foreign Com- [*1652] pacts Clause or because of dormant preemption. n150 But by this time the issue of self-executing exclusivity had become largely moot in light of the federal government's comprehensive regulation of the issue by statute and treaty. n151

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n144. 1 John Bassett Moore, A Treatise on Extradition and Interstate Rendition 54 (1891); see generally id. at 53-71 (collecting state extradition statutes and extradition cases). As Moore's treatise makes clear, the validity of this practice was questioned by some even during this early period. Id. at 70 n.5.

n145. 39 U.S. (14 Pet.) 540 (1840). The Court split 4-4 on whether it had jurisdiction to review the case under Section 25 of the Judiciary Act of 1789, so there was no opinion on the merits or judgment for the Court. See id. at 561. There were only eight participating Justices because Justice John McKinley was absent during the term. See id. at vii.

n146. Id. at 570-74.

n147. Id. at 574. Taney's opinion is laced with suggestions that federal power in "foreign intercourse" is exclusive and that a concurrent state power to extradite was "incompatible and inconsistent with the powers conferred on the federal government." Id. at 570. However, the opinion always ties the exclusivity point to a federal policy, inferred from the absence of federal extradition treaties, to prohibit all extraditions to foreign countries. Id. at 574, 576. Similarly, when the opinion suggests by analogy that the power of appointing ambassadors is exclusively federal despite the absence of an express prohibition on states in Article I, 10, it once again assumes that the "general [federal] government deemed it to be the true policy of the country to have no communication or connection with foreign nations." Id. at 577 (emphasis added).

n148. Justices Smith Thompson and Philip Barbour rejected both the dormant preemption and Foreign Compacts Clause arguments. Id. at 579-86 (Thompson, J.); id. at 586-94 (Barbour, J.). Justice John Catron rejected the dormant preemption argument but stated that if additional facts had revealed an agreement between Vermont and Canada, he would have voted to strike down the extradition as a violation of Article I, 10's prohibition on foreign compacts by states. Id. at 594-98 (Catron, J.). Justice Henry Baldwin joined "fully and cordially" in the opinions of Justices Thompson, Barbour, and Catron. Id. at 614 (Baldwin, J.). On remand from the Supreme Court's 4-4 decision, the Vermont Supreme Court concluded on the basis of further evidence that the extradition did constitute "an agreement between the governor of this state, in behalf of the state, and the governor of Canada." Ex Parte Holmes, 12 Vt. 631, 640 (1840). The court reasoned that this additional evidence of an agreement, combined with the opinion of Justice Taney (which got four votes) and Justice Catron's crucial fifth vote on the Article I, 10 rationale, required Holmes's release. Id. at 641-42.

n149. Moore's classic treatise, Moore, supra note 144, reports very little post-Holmes state extradition activity. In 1841, Governor William Henry Seward of New York asked British authorities in Canada to surrender a fugitive named Mitchell, and at the same time wrote privately to President John Tyler and Secretary of State Daniel Webster seeking assistance. See id. at 67-68. The President responded that he lacked authority to request the extradition or "to sanction such a proceeding on the part of the State." Id. at 68. The British authorities subsequently surrendered Mitchell to New York after receiving a request from Webster for "friendly aid" and a letter from Seward seeking the

surrender as an act of courtesy. Id. Later the same year, the same British authorities asked Seward to surrender a fugitive named De Witt. It is unclear whether De Witt was ever surrendered, but Seward did seek advice from the federal executive branch, and received a letter from Webster stating that "the government of the United States...would see with entire approbation the exercise of the power understood to be vested in your Excellency, by the laws of New York, in causing De Witt to be delivered up to the proper Canadian authorities." Id. at 69 (quoting letter from Secretary of State Webster to Governor Seward) (Sept. 16, 1841). See also id. (noting subsequent opinion to Webster from Attorney General Hugh Legare "adverse to the power of a State to grant extradition"). Although Moore reported no subsequent state extraditions, he did note that after Holmes, three states enacted statutes providing for independent state extradition authority, one as late as 1887. See id. at 73-74. He also noted his belief that these statutes were "obnoxious to the constitutional objections raised against the law of New York" struck down in People v. Curtis, 50 N.Y. 321 (1872). See Moore, supra note 144, at 74. For a discussion of Curtis, see infra note 150.

n150. Thus, for example, in United States v. Rauscher, 119 U.S. 407 (1886), a case involving the interpretation of a federal extradition treaty, the Court in dicta approved of Taney's opinion in Holmes that the extradition power was exclusively federal without making clear whether this was because of Article I, 10 or dormant preemption. Id. at 414. Similarly, when the New York Court of Appeals held that an extradition pursuant to New York's 1822 extradition statute was unconstitutional, it too embraced Taney's Holmesopinion, and it too left unclear whether its holding rested on Article I, 10 or an independent dormant preemption. Curtis, 50 N.Y. at 325-26. Samuel Spear's 1885 treatise also argued for federal exclusivity on the alternative grounds of Article I, 10 and dormant preemption, although he included only the Article I, 10 argument under the heading of "The Constitutional Prohibition." Samuel T. Spear, The Law of Extradition: International and Inter-State 15-20 (1885). Summarizing all of these developments in 1891, Moore viewed it as "settled doctrine" that the extradition power was exclusive, but emphasized that the issue "has by no means been free from controversy, and has never been actually decided by the Supreme Court of the United States." Moore, supra note 144, at 53.

n151. See Rauscher, 119 U.S. at 414-15:

[The question of exclusivity of the extradition power] in the absence of treaties or acts of Congress on the subject, is now of very little importance, since, with nearly all the nations of the world with whom our relations are such that fugitives from justice may be found within their dominions or within ours, we have treaties which govern the rights and conduct of the parties in such cases. These treaties are also supplemented by acts of Congress, and both are in their nature exclusive.

Cf. Valentine v. United States, 299 U.S. 5, 8 (1936) (stating, in case interpreting federal extradition treaty, that "it cannot be doubted that the power to provide for extradition is a national power; it pertains to the national government and not to the States").

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Similarly, immigration was largely under the control of the states for the first hundred years of the nation. n152 This practice abated in the last half

of the nineteenth century after the Supreme Court struck down certain state laws regulating the migration of aliens on dormant commerce grounds, and the federal political branches began to enact immigration statutes and enter into treaties that regulated the issue. n153 One of the dormant Com- [*1653] merce Clause decisions, Chy Lung v. Freeman, n154 exemplified the logic behind what would later become foreign affairs preemption. n155 But Chy Lung did not, as some have claimed in retrospect, "establish[ ] a presumption of state incapacity with respect to all matters implicating foreign relations." n156 Numerous post-Chy Lung state anti-alien statutes provoked stormy diplomatic controversies that sometimes threatened war but that never raised a question about foreign affairs preemption. n157 The many pre-1964 statements about the exclusivity of the federal immigration power came in cases involving the interpretation of a federal statute or treaty and did not purport to reflect a notion of dormant foreign affairs preemption. n158 In one such case as late as [*1654] 1941, the Court emphasized that it remained an open question whether "federal power in [immigration], whether exercised or unexercised, is exclusive." n159

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n152. See Gerald L. Neuman, The Lost Century of American Immigration Law (1776-1875), 93 Colum. L. Rev. 1833 (1993). The first federal immigration statute is generally considered to be the Act of Mar. 3, 1875, ch. 141, 18 Stat. 477. See Neuman, supra, at 1887 n.347.

n153. See Neuman, supra note 152, at 1886-87.

n154. 92 U.S. 275 (1875).

n155. In the course of invalidating on dormant Commerce Clause grounds a California statute that gave a California bureaucrat discretion to require the posting of shipmaster bonds for incoming immigrants, the Court reasoned that the Constitution did not leave the states the power to enact laws that would implicate the international liability of the entire nation. Id. at 279-80.

n156. Spiro, supra note 62, at 138 n.66.

n157. Perhaps the best example are California's anti-Japanese laws, which produced enormous diplomatic controversy, see infra notes 160-162 and accompanying text, but which were upheld without any consideration of a dormant preemption theory. See Frick v. Webb, 263 U.S. 326 (1923); Webb v. O'Brien, 263 U.S. 313 (1923); Porterfield v. Webb, 263 U.S. 225 (1923); see also Ohio ex rel. Clarke v. Deckebach, 274 U.S. 392 (1927) (upholding ordinance prohibiting aliens from obtaining licenses to conduct pool and billiard rooms); Heim v. McCall, 239 U.S. 175 (1915) (upholding a New York labor law that prohibited aliens from being employed on public works projects). Professor Spiro wonders why the Supreme Court did not strike down some of these post-Chy Lung anti-alien laws, since they provoked diplomatic controversy and appeared to present a "classic opportunity to deploy the foreign relations rationale for constraining state activity in the area." Spiro, supra note 62, at 141. The absence of a post-Chy Lung dormant foreign relations preemption doctrine sparks wonder only if one incorrectly assumes that Chy Lungestablished such a doctrine. The absence of any mention or use of any such doctrine in these subsequent decisions confirms what the rest of the historical evidence suggests, namely, that Chy Lung established no such doctrine. This reading is confirmed by Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948), which dramatically limited the decisions cited above, but

did so on Fourteenth Amendment equal protection grounds, not dormant foreign relations preemption grounds. Id. at 419-20, 422 & nn.8-9; see also Clark v. Allen, 331 U.S. 503, 516-17 (1947) (rejecting a foreign relations attack on a state anti-alien inheritance statute as "farfetched"); Blythe v. Hinckley, 180 U.S. 333, 340 (1901) (rejecting as "extraordinary" the argument that a California statute permitting aliens to inherit real property invaded the unexercised treaty power).

n158. See, e.g., Oyama v. California, 332 U.S. 633, 649 (1948) (Black, J., concurring); Terrace v. Thompson, 263 U.S. 197, 217 (1923); Truax v. Raich, 239 U.S. 33, 42-43 (1915).

n159. Hines v. Davidowitz, 312 U.S. 52, 62 (1941) (finding state alien registration law to be preempted by federal statute). See also Henkin, supra note 1, at 434 n.57 (making similar point about Hines).

The claims in the text might surprise those who are used to thinking that immigration has long been a constitutionally guaranteed exclusive federal prerogative. Professor Gerald Neuman's article exploded this myth as it pertained to the 19th century, see Neuman, supra note 152, and there is surprisingly little case law to support this belief in the 20th century. Modern constitutional control over the states in the immigration field is largely secured by the Equal Protection Clause, not dormant preemption. See, e.g., Takahashi, 334 U.S. at 419-20. Even post-1964 decisions that refer to the exclusivity of the federal immigration power tend to have comprehensive federal regulation, rather than self-executing constitutional exclusivity, in mind. See, e.g., Sugarman v. Dougall, 413 U.S. 634, 638 (1973) (referring to exclusive federal power by virtue of Congress's "comprehensive regulation of immigration and naturalization"); Graham v. Richardson, 403 U.S. 365, 376-80 (1971) (considering only statutory preemption). The earliest decision I have found that squarely considers an argument based on constitutional federal exclusivity in immigration is De Canas v. Bica, 424 U.S. 351 (1976). The De Canas Court clearly believed that the "determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain," id. at 355, was a power that the Constitution gave exclusively to the federal government. Id. at 354-56 (rejecting claim on facts). But the Court's reliance for this proposition on the 19th-century dormant Commerce Clause decisions (including Chy Lung), id. at 354-55, was, as Professor Neuman has suggested, an "anachronistic" projection of "this modern constitutional understanding onto the earlier period." Neuman, supra note 152, at 1893. And indeed, as in the extradition context, this modern constitutional understanding is largely moot in light of Congress's occupation of the field with a "complex scheme governing admission to our Nation and status within our borders." Plyler v. Doe, 457 U.S. 202, 225 (1982).

Thus, although some modern courts have held in the alternative to a statutory preemption argument that a state regulation was preempted by force of the constitutionally based exclusive federal immigration power, see League of United Latin American Citizens v. Wilson, 908 F. Supp. 755, 786 (C.D. Cal. 1995), appeal pending, No. 97-55388 (9th Cir.) (argued Oct. 8, 1997), I have found no court that rests its decision to preempt solely on a constitutionally based federal exclusivity in immigration. Some worry that the recent focus on the states' historical role in immigration portends "continuing or revived state involvement" in immigration. Hiroshi Motomura, Whose Immigration Law?: Citizens, Aliens, and the Constitution, 97 Colum. L. Rev. 1567, 1590 (1997) (book

review). If the concern is that substantive federalism limitations on Congress's power to control immigration might develop, the concern seems unwarranted. But if the concern is that Congress might choose to return some aspects of immigration regulation to the states, there appears to be nothing in our constitutional history or in current constitutional doctrine to prevent this development. See Plyler, 457 U.S. at 224-26 (suggesting that Congress can by statute authorize states to regulate certain aspects of immigration).

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The absence of a federal common law of foreign relations prior to 1964 is significant because throughout the period, states often acted in ways not prohibited by a federal enactment that either looked like the exercise of a foreign relations power or that stirred foreign relations controversy. As just discussed, immigration and (to a lesser extent) extradition were under state control for much of the nineteenth century. In addition, California's numerous anti-alien acts and ordinances in the late nineteenth and early twentieth centuries provoked heated, and extended, diplomatic controversy; n160 Theodore Roosevelt described California's anti-Japanese activities as the biggest foreign relations problem of his Presidency. n161 Many of these anti-alien acts were challenged on a number of constitutional and treaty grounds (all of which were rejected), but no one suggested that they should be preempted under a dormant foreign relations theory. n162 Similarly, the antebellum Negro Seamen Acts caused "a persistent diplomatic embarrassment" that the federal government, including federal courts, "proved powerless to solve." n163 A dormant [*1656] foreign relations doctrine would most likely have been ineffective in light of contemporary slavery politics; nonetheless, no such doctrine was contemplated as a solution.

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n160. For general accounts, see Oyama v. California, 332 U.S. 633, 650-663 (1948) (Murphy, J., concurring); Thomas A. Bailey, Theodore Roosevelt and the Japanese-American Crises: An Account of the International Complications Arising from the Race Problem on the Pacific Coast (1934); Elmer Clarence Sandmeyer, The Anti-Chinese Movement in California (1939); Dennis James Palumbo, The States and American Foreign Relations 147-192 (1960) (unpublished Ph.D. dissertation, University of Chicago, on file with the Virginia Law Review Association).

n161. See Bailey, supra note 160, at x, 307.

n162. The Supreme Court upheld the anti-alien land acts that caused a great deal of controversy without considering anything like a dormant foreign relations preemption doctrine. See Frick v. Webb, 263 U.S. 326 (1923); Webb v. O'Brien, 263 U.S. 313 (1923); Porterfield v. Webb, 263 U.S. 225 (1923); Terrace v. Thompson, 263 U.S. 197 (1923) (Washington state statute). The many articles discussing legal objections to these and related state laws never discussed the possibility of dormant foreign relations preemption. See Raymond Leslie Buell, Some Legal Aspects of the Japanese Question, 17 Am. J. Int'l L. 29 (1923); Charles Wallace Collins, Will the California Alien Land Law Stand the Test of the Fourteenth Amendment?, 23 Yale L.J. 330 (1914); Nelson Gammans, The Responsibility of the Federal Government for Violations of the Rights of Aliens, 8 Am. J. Int'l L. 73 (1914); Dudley O. McGovney, The Anti-Japanese Land Laws of California and Ten Other States, 35 Cal. L. Rev. 7 (1947); Thomas Reed Powell,

Alien Land Cases in the United States Supreme Court, 12 Cal. L. Rev. 259 (1924); Elihu Root, The Real Questions under the Japanese Treaty and the San Francisco School Board Resolution, 1 Am. J. Int'l L. 273 (1907).

n163. Neuman, supra note 152, at 1877. The Negro Seamen Acts, which required temporary imprisonment or quarantine of black employees on incoming vessels, were adopted by several Southern states between 1822 and 1860. See Philip M. Hamer, British Consuls and the Negro Seamen Acts, 1850-1860, 1 J.S. Hist. 138 (1935) [hereinafter Hamer, British Consuls]; Philip M. Hamer, Great Britain, the United States, and the Negro Seamen Acts, 1822-1848, 1 J.S. Hist. 3 (1935) [hereinafter Hamer, Great Britain]. South Carolina enacted the first and most prominent such act in 1822. See Hamer, Great Britain, supra, at 3. Riding circuit in 1823, Justice William Johnson declared the South Carolina Act invalid under both the 1815 commercial treaty with Great Britain and the dormant Commerce Clause (the first use of the dormant Commerce Clause). Elkison v. Deliesseline, 8 F. Cas. 493, 495 (C.C.D.S.C. 1823) (No. 4366); see also 1 Op. Att'y Gen. 659 (1824) (opinion of President James Monroe's Attorney General, William Wirt, drawing on similar logic). Ultimately, Johnson determined that the Court lacked jurisdiction to issue a remedy in Elkison, see 8 F. Cas. at 498, and in any event, South Carolina subsequently ignored the decision. When Britain later complained to the United States about South Carolina's continued enforcement of the Act, President Andrew Jackson's Attorney General John Berrien concluded that the Act was an exercise of police power that did not conflict with the Constitution or any treaty. See 2 Op. Att'y Gen. 426 (1831). The United States subsequently responded to continued foreign sovereign complaints about the Negro Seamen Acts with the assertion that it lacked the authority to invalidate them. See Hamer, Great Britain, supra, at 16-28. The British government over the next 30 years negotiated with several states over the matter, with mixed success. See Hamer, British Consuls, supra; Hamer, Great Britain, supra.

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In addition, in the years following the Russian Revolution, numerous New York state courts invoked state law and state public policy to deny local effect to nationalizations by the unrecognized Soviet Union. n164 These decisions were one sticking point in subsequent negotiations leading to the United States' recognition of the Soviet Union in 1933. n165 Nevertheless, such decisions were viewed to be valid applications of state law until they were later preempted by President Roosevelt's executive agreement with the Soviet Union. n166 Similarly, during the late [*1657] nineteenth and early twentieth centuries, states' failures to protect aliens or to prosecute perpetrators of mob violence created diplomatic embarrassments for the federal government that led many Presidents to call for enactment of federal criminal law to address the problem. n167 No one in these debates suggested, however, that federal courts develop such a law under a federal common law of foreign relations rationale. n168 Moreover, I have found no evidence that anyone thought that a federal common law of foreign relations preempted nineteenth-century state foreign policy declarations, n169 New York's 1895 retaliatory action against Prussia for restrictions on New York insurance companies, n170 or the state buy-American laws of the 1930s. n171 There are many similar examples. n172

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n164. See, e.g., Petrogradsky Mejdunarodny Kommerchesky Bank v. Nat'l City Bank of N.Y., 170 N.E. 479 (N.Y. 1930), cert. denied, 282 U.S. 878 (1930); Fred S. James & Co. v. Rossia Ins. Co., 160 N.E. 364 (N.Y. 1928); Sokoloff v. Nat'l City Bank of N.Y., 145 N.E. 917 (N.Y. 1924); see generally Louis L. Jaffe, Judicial Aspects of Foreign Relations (1933) (analyzing these and related decisions).

n165. See Donald G. Bishop, The Roosevelt-Litvinov Agreements: The American View 179-85 (1965).

n166. See United States v. Pink, 315 U.S. 203, 228-34 (1942); United States v. Belmont, 301 U.S. 324, 331-32 (1937); Note, Effect of Soviet Recognition upon Russian Confiscatory Decrees, 51 Yale L.J. 848 (1942).

n167. See William H. Taft, The United States and Peace 46-61 (1914). See also 6 John Bassett Moore, A Digest of International Law 1022-31, at 809-83 (1906). For discussions of the problems caused by mob violence in the states, and proposed solutions, see, e.g., 1 Charles Cheney Hyde, International Law: Chiefly as Interpreted and Applied by the United States 290-91, at 516-21 (1922); Charles H. Watson, Need of Federal Legislation in Respect to Mob Violence in Cases of Lynching of Aliens, 25 Yale L.J. 561 (1916).

n168. Late 18th-century intimations that such a power existed, see, e.g., United States v. Worrall, 28 F. Cas. 774, 778 (C.C.D. Pa. 1798) (No. 16,766), did not survive several early 19th-century Supreme Court decisions. See Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 657-58 (1834); United States v. Coolidge, 14 U.S. (1 Wheat.) 415, 416-17 (1816); United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 33-34 (1812). See generally Stewart Jay, Origins of Federal Common Law: Part One, 133 U. Pa. L. Rev. 1003 (1985) (describing federal common law crimes debate).

n169. See, e.g., Wright, supra note 128, at 264-65 & n.5 (1922); Palumbo, supra note 160, at 38-48.

n170. See, e.g., Palumbo, supra note 160, at 48-50.

n171. See, e.g., Percy W. Bidwell, The Invisible Tariff 255-62 (1939).

n172. See, e.g., Moore, supra note 80, at 313; Palumbo, supra note 160, at 50-88, 225-28.

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A parallel phenomenon existed with respect to customary international law. Throughout the nineteenth century and for much of the twentieth, customary international law had the domestic status of general common law. n173 State and federal courts alike applied customary international law, but this law was not part of the "Laws of the United States" within the meaning of Article III or the Supremacy Clause. n174 As a result, states could [*1658] violate customary international law, n175 and the Supreme Court could not review state court interpretations of customary international law. n176 The Court once held that customary international law was not federal law over a lone dissent that argued the contrary under logic akin to the federal common law of foreign relations. n177

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n173. See Bradley & Goldsmith, supra note 101, at 824-26, 849-52.

n174. See id. at 824-25.

n175. See Wright, supra note 128, at 161 (stating in 1922 that a "state constitution or legislative provision in violation of customary international law [is] valid unless in conflict with a Federal constitutional provision or an act of Congress"); Charles Pergler, Judicial Interpretation of International Law in the United States 19-20 (1928) (same); see generally Bradley & Goldsmith, supra note 101, at 824-26, 849-52 (providing additional evidence).

n176. See, e.g., Transportes Maritimos do Estado v. Almeida, 265 U.S. 104, 105 (1924) (holding that claim of foreign sovereign immunity is question of general law that does not present a federal question); Oliver Am. Trading Co. v. Mexico, 264 U.S. 440, 442-43 (1924) (same); Ker v. Illinois, 119 U.S. 436, 444 (1886) (holding that question of whether forcible seizure in foreign country is grounds to resist trial in state court is "a question of common law, or the law of nations," that Supreme Court has "no right to review").

n177. New York Life Ins. Co. v. Hendren, 92 U.S. 286 (1875). The Court held that it lacked jurisdiction to review "general laws of war, as recognized by the law of nations applicable to this case" because they do not involve "the constitution, laws, treaties, or executive proclamations, of the United States." Id. at 286-87. In dissent, Justice Joseph Bradley argued that "unwritten international law" was part of the "laws of the United States" because the law of nations was an exclusive federal concern. Id. at 288 (Bradley, J., dissenting).

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Furthermore, many private international law rules - transnational choice of law, transnational commercial law, and the law governing enforcement of foreign judgments - had the domestic status of general common law. Federal courts sitting in diversity could apply these laws to resolve "foreign relations" disputes within their jurisdiction, usually without regard to the pertinent state law. But again, these laws were not federal law, and federal court interpretations of them were not binding on the states. n178

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n178. Thus, for example, state courts sometimes departed from the views of federal courts over the content of the law merchant. See Fletcher, supra note 25, at 1521, 1558-62. Similarly, several state courts declined to follow the rule of reciprocity for the enforcement of foreign judgments announced in Hilton v. Guyot, 159 U.S. 113, 227 (1895), see, e.g., Johnston v. Compagnie Generale Transatlantique, 152 N.E. 121, 123 (N.Y. 1926), and the Supreme Court held that the issue did not present a federal question, Aetna Life Ins. Co. v. Tremblay, 223 U.S. 185, 190 (1912).

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B.

Significance

The absence of a judge-made foreign relations law prior to 1964 shows that the pre-1964 Supreme Court statements about federal exclusivity in foreign relations do not support the modern practice. As in the extradition and immigration contexts, these broader statements about federal exclusivity in foreign affairs were made in cases upholding federalism or enumerated power challenges to political branch exercises of foreign relations power. n179 It is unclear whether the statements merely recognized the fact that the political branches had occupied the field in question, or were designed to support the political branches' plenary power to enact the laws in question. But as the jurisprudence preceding Sabbatino and Zschernig and the reactions to those decisions indicate, the existence of a plenary federal foreign relations lawmaking power in the federal political branches in the pre-1964 period was not viewed to entail a self-executing or exclusive power in the absence of its exercise. The exclusivity statements by themselves thus provide no support for the modern practice. Their invocation is anachronistic.

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n179. This is true, for example, of all the famous decisions cited supra note 118. See United States v. Pink, 315 U.S. 203 (1942) (holding that an executive agreement preempted state property laws); United States v. Belmont, 301 U.S. 324 (1937) (same); Hines v. Davidowitz, 312 U.S. 52, 73-74 (1941) (holding that a state immigration statute was preempted by a similar federal statute); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 322 (1936) (upholding Congress's statutory delegation to the President); The Chinese Exclusion Case, 130 U.S. 581, 606 (1889) (upholding the validity of the federal political branches' power to exclude aliens by statute).

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A similar analysis applies to the bete noire of U.S. foreign relations law, United States v. Curtiss-Wright Export Corp. n180 In the course of upholding a congressional delegation to the President of the power to ban certain arms sales, Curtiss-Wright asserted that "the states severally never possessed international powers," n181 and that the "investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution," n182 but rather passed [*1660] from Great Britain to the United States as a corporate entity by virtue of the law of nations. n183 These statements have been severely criticized on a number of grounds. n184 In any event, they provide no support for the federal common law of foreign relations. Curtiss-Wright says nothing about the scope of the "international powers" the states never possessed; to the extent the statement is true, it is likely limited to traditional foreign relations powers expressly denied to the states in both the Articles of Confederation and the Constitution. n185 Moreover, assuming that the United States' "powers of external sovereignty" are extraconstitutional, neither international law nor the nature of sovereignty says anything about the allocation of sovereign power within a federal system, much less anything about the existence or scope of a self-executing federal power. n186 Most importantly for present purposes, Curtiss-Wright addressed

the validity of the political branches' exercise of a foreign relations power, and did not consider a self-executing realm of exclusive federal for-
[*1661] eign affairs power. For 150 years prior to Curtiss-Wright, and for almost thirty years after, courts recognized no such power.

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n180. 299 U.S. 304 (1936). Professor Bradford Clark has recently relied on Curtiss-Wright as a justification for the federal common law of foreign relations. See Clark, supra note 62, at 1296-97.

n181. 299 U.S. at 316.

n182. Id. at 318.

n183. Id. at 316.

n184. Professor Henkin sums up the criticism well: The notion that "the new United States government was to have major powers outside the Constitution is not intimated in the Constitution itself, in the records of the Convention, in the Federalist Papers, or in contemporary debates." Henkin, supra note 1, at 19-20; see also Harold Hongju Koh, The National Security Constitution 94 (1990) (summarizing the "withering criticism" of Curtiss-Wright). Curtiss-Wright's more particular historical-conceptual claims about the sources and locus of foreign relations power after the American Revolution are part of a larger debate about the meaning and nature of sovereignty in the revolutionary and constitution-building periods. For the view that the states retained powers of "external sovereignty" in the post-revolutionary period, and that the United States acquired these powers via the Articles and the Constitution rather than directly from Great Britain, see David M. Levitan, The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory, 55 Yale L.J. 467, 478-90 (1946); Claude H. Van Tyne, Sovereignty in the American Revolution: An Historical Study, 12 Am. Hist. Rev. 529 (1907). For the view that the states never possessed foreign relations powers, see Richard B. Morris, The Forging of the Union Reconsidered: A Historical Refutation of State Sovereignty over Seabeds, 74 Colum. L. Rev. 1056, 1088-89 (1974); Curtis Putnam Nettels, The Origins of the Union and of the States, 72 Proceedings Mass. Hist. Soc'y 68 (1957-1960). For an account that emphasizes the nuances and uncertainties of the issue, see Jack P. Greene, Peripheries and Center: Constitutional Development in the Extended Politics of the British Empire and the United States, 1607-1788, at 153-80 (1986).

n185. See supra note 121.

n186. See Henkin, supra note 1, at 436 n.64 ("International sovereignty implies nothing about the distribution of responsibility between nation and state in a federal system.").

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Finally, the historical account casts serious doubt on originalist claims in support of the federal common law of foreign relations. n187 The relevance of an original intent argument to a doctrine that did not exist prior to 1964 is unclear. I have not comprehensively examined the founding period on this issue. But the framers' frequently cited statements about the importance of federal

control over foreign relations were made in the context of explaining the executory powers of the federal political branches, the jurisdiction (as opposed to lawmaking capacities of) the federal courts, or the narrowly defined limitations imposed by Article I, Section 10. n188 In this light, the original intent concerning the structure of federal control over states in foreign affairs appears to be what the constitutional text suggests and what 175 years of subsequent practice confirmed: Such control was guaranteed by (a) Article I, Section10's limitations on state activity, (b) the broad foreign relations powers conferred on the political branches, and (c) the availability of a federal judiciary to interpret the Constitution, treaties, statutes, and general common law.

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n187. See supra notes 116-118 and accompanying text.

n188. Consider the famous examples cited in footnote 117. Madison in Federalist 42 was discussing Congress's executory foreign relations powers under Article I. Hamilton in Federalist 80 was discussing alienage jurisdiction. And Jefferson in his letter to Madison was discussing the Virginia assembly's resolution to give the federal government control over foreign commerce.

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I have engaged in this lengthy historical exegesis to establish that, contrary to conventional wisdom, the federal common law of foreign relations announced by Sabbatino and Zschernig marked a sharp departure from prior law. For originalists of a certain sort, this analysis will suffice to undermine the legitimacy of the modern practice. n189 For many others, however, including some who consider themselves originalists, n190 the historical ac- [*1662] count will not by itself suffice. This is because many of the international relations and constitutional law assumptions underlying the historical absence of judge-made federal foreign relations law had changed dramatically by the 1960s when the practice began. The obvious truth of this latter point makes it unnecessary to trace these changes in detail. So I mention only four highlights.

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n189. I refer here to the Bork-Scalia version of originalism, which relies heavily on original understanding, and which imposes a strong presumption against judge-initiated deviations from historical constitutional practice. See Robert H. Bork, The Tempting of America: The Political Seduction of the Law 143-160, 251-59 (1990); Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849 (1989).

n190. See, e.g., Lawrence Lessig, Translating Federalism: United States v. Lopez, 1995 Sup. Ct. Rev. 125, 127 (describing "interpretive fidelity," the technique of translating "that original [constitutional] structure into the context of today," as a version of originalism).

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First, many of the state acts that gave rise to foreign relations controversies fell within the reserved power of the states. Far from impinging upon an exclusive federal power, these acts were thought to fall within state

prerogatives to regulate local land transactions, or to protect the health, safety, and morals of their citizens. n191 Before Holland in 1920, many courts, federal officials, and academic commentators suggested that these reserved powers limited even the federal political branches' exercisesof the treaty power. n192 In these contexts, a theory of dormant foreign relations preemption was unthinkable. By the 1960s, of course, dual federalism had been rejected, especially in contexts related to foreign relations. n193

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n191. Professor Neuman emphasizes the related point that the federal government's reluctance in the 19th century to enact federal laws regulating the migration of persons was inextricably tied to antebellum disputes over slavery. See Neuman, supra note 152, at 1889, 1893.

n192. See supra note 130 and accompanying text.

n193. See Edward S. Corwin, The Constitution and World Organization 9-20 (1944); Edward S. Corwin, The Passing of Dual Federalism, 36 Va. L. Rev. 1 (1950).

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Second, we have seen that in the nineteenth and early twentieth centuries, the adverse foreign relations effects caused by states were viewed as doctrinally irrelevant to the allocation of state and federal power in foreign affairs. This was consistent with then-prevailing categorical/formalistic approaches to constitutional interpretation, which focused more on the nature of the power exercised than on its effects. n194 By the 1960s, however, this categorical/formalistic approach had been largely replaced by a more instrumental approach to constitutional adjudication that focused on the effects of state action on federal power and by a balancing of state and federal interests. n195 As a result, for- [*1663] eign relations effects might today be more relevant to the assessment of the legitimacy of state action than in the nineteenth and early twentieth centuries.

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n194. See T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943, 949-52 (1987).

n195. See id. at 966-67.

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Third, prior to Erie, federal courts were able to resolve many public and private international law controversies by recourse to general common law. n196 Because federal courts were not bound by state court interpretations of general common law, they could achieve at least a modicum of federal judicial control in these areas in virtue of federal jurisdiction alone. n197 Erie's abrogation of general common law in federal courts, and its insistence that every rule of decision in federal court be authorized by state or federal law, n198 eliminated this means of federal judicial control. Novel forms of federal common lawmaking might be necessary to achieve similar control in a post-Erie, post-general common law world.

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n196. See supra notes 24-27 and accompanying text.

n197. See Bradley & Goldsmith, supra note 101, at 826.

n198. 304 U.S. at 78 ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."); see also Stewart Jay, Origins of Federal Common Law (pt. 2), 133 U. Pa. L. Rev. 1231, 1312 (1985). ("[After Erie, a] common-law rule...must be associated with the sovereign that has authority to promulgate it: either the state or the federal government.").

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Finally, the nature of international relations, and of the United States' role in such relations, had changed dramatically by the 1960s, when federal judicial lawmaking in foreign relations began. The United States had become one of two world superpowers in an increasingly dangerous world characterized by the cold war and the possibility of nuclear destruction. Among many constitutional alterations wrought by these changes were an unprecedented increase in federal power at the expense of the states in foreign relations and a related centralization of foreign relations power in the President. n199 The underlying structural pressures that led to these constitutional changes might also entail a need for novel foreign relations lawmaking powers in the federal judiciary. It is probably no accident that the Supreme Court applied a judge-made federal foreign relations law for the first time- [*1664] less than two years after the Cuban Missile Crisis in a case involving a Cuban expropriation of American property. n200

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n199. See Koh, supra note 184, at 93-100; G. Edward White, The Transformation of the Constitutional Regime of Foreign Relations (unpublished manuscript, on file with the Virginia Law Review Association).

n200. Sabbatino, 376 U.S. 398.

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In sum, our constitutional history does not, as many think, provide support for the modern federal common law of foreign relations. Sabbatinoand Zschernig were genuine constitutional innovations. For 175 years, federal judicial lawmaking in foreign affairs did not supplement the political branches' comprehensive power to preempt state law through foreign relations enactments. The historical evidence undercuts the federal common law of foreign relations' most frequently invoked basis of support. But many reasons for the absence of the practice before 1964 had changed by that date, often dramatically. These changed circumstances might support a functional justification for the federal common law of foreign relations. It is to an analysis and critique of this functional justification that I now turn. n201

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n201. I hope to circumvent the debate about the relative significance to modern constitutional interpretation of text, original understanding, historical practice, and other factors. See generally Symposium, Fidelity in Constitutional Theory, 65 Fordham L. Rev. 1247 (1997). I have just shown that there is no textual or historical basis for the modern practice. In the next Part, I argue that the modern functional claims for the doctrine that take into account the changed circumstances outlined above are equally invalid. My ultimate aim is to show that whatever one's theory of constitutional interpretation, there is no justification for the federal common law of foreign relations.

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## III. A Revisionist View

The federal common law of foreign relations leaves the final word about the existence and scope of federal preemption in the foreign relations field to the federal political branches. When analyzing the legitimacy of the doctrine, then, the issue is not whether the federal government has adequate authority vis-a-vis the states to conduct foreign relations. Rather, the issue is whether the political branches share this comprehensive federal foreign relations lawmaking power with the federal judiciary. The issue can be understood as a search for the proper default rule in the absence of an exercise of foreign relations power by the federal political branches: Should the default rule be federal common law or state law? [*1665]

After describing the functional case for a default rule that favors federal common law, I argue in this Part for the opposite default rule that favors state law control. The argument proceeds in three steps. I first note that the foreign relations issues preempted by the federal common law of foreign relations are much different from the traditional foreign relations functions that Article I, Section 10 makes presumptively federal, and I raise a number of questions about the normative claim that the federal common law of foreign relations should apply in these new domains. I then argue that the need for such federal judicial lawmaking is greatly exaggerated. The Constitution's presumptive federal foreign relations lawmakers, Congress and the President, have adequate means to monitor and, when necessary, to override state practices affecting foreign relations. Finally, I argue that because courts are not good at making the judgments required by the federal common law of foreign relations, the doctrine produces a number of overlooked judicial error and decision costs that, in contrast to state activity that intrudes on federal foreign relations prerogatives, the political branches are not likely to redress.

This Part has two aims. The first is to replace wooden notions of foreign affairs exclusivity with a framework that more accurately captures the realities of modern international relations and the institutional dynamics of judicial lawmaking in the foreign affairs context. The second is to show, within this new framework, that the federal common law of foreign relations lacks justification. This second aim poses more difficulties, because it depends on empirical and institutional claims that are plausible but hard to demonstrate with certainty. My hope is that some will find value in my framework for understanding the problem even if they are not convinced by my solution within this framework.

A.

The Functional Case for the Federal Common Law of Foreign Relations

Although the federal common law of foreign relations lacks a clear basis in constitutional text or a long historical pedigree, it might find support in functional arguments analogous to those [*1666] invoked to justify the dormant Commerce Clause. Many have pointed to this analogy. n202 But the literature does not contain a comprehensive account of the functional case for the federal common law of foreign relations. In this Section I try to provide such an account.

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n202. See, e.g., Henkin, supra note 1, at 164; Richard B. Bilder, The Role of States and Cities in Foreign Relations, 83 Am. J. Int'l L. 821, 830 (1989).

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The functional case for the federal common law of foreign relations begins with the fact that state decisionmakers lack a national perspective and have every incentive to pursue parochial interests at the expense of other states and, more generally, the nation. The pursuit of such interests can harm the national foreign relations interest, either by preventing the political branches from speaking with "one voice," or by offending a foreign sovereign in a manner that redounds to the detriment of the entire nation. The high likelihood that state activities will produce such foreign relations externalities perhaps justifies a comprehensive federal foreign relations power. But it does not by itself require exclusive federal power in this area. It might suffice to place foreign relations powers within concurrent federal-state authority until the national government decides that the existence of these externalities necessitates exclusive federal control.

For these reasons, the functional case for a federal common law of foreign relations requires the important additional assumption that the federal political branches lack the institutional capacity "to anticipate or deal with all the possible state encroachments on the national [foreign relations] interest." n203 On this view, uncoordinated state activity can produce adverse foreign relations consequences for the nation as a whole that are not easily redressable by the overburdened national political branches. When this point is combined with the assumptions that (a) a residual concurrent state foreign relations authority is very likely to affect adversely the United States' conduct of foreign relations, and (b) the federal political branches desire exclusive control in this area, it appears to follow that foreign relations matters should at least presumptively be governed by federal [*1667] law. n204 Thus, the argument goes, when the political branches are silent, federal courts charged with interpreting the structural provisions of the Constitution must invalidate state laws that impermissibly impinge upon the federal foreign relations power, and, when necessary, replace that law with a judge-made rule.

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n203. Henkin, supra note 1, at 436 n.64; see also Moore, supra note 80, at 256; Spiro, supra note 62, at 144-45.

n204. Moreover, even in the absence of strategic behavior by the states, uniform federal regulation of a foreign relations issue might be viewed as preferable to the nonuniformity inherent in state-by-state regulation. See Chemerinsky, supra note 67, at 349.

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This reasoning purports to show that states have no legitimate interest in the conduct of foreign relations. Its widespread acceptance explains the absence of any serious federalism objection to the federal common law of foreign relations. But this reasoning does not by itself explain the legitimacy of the doctrine vis-a-vis the federal political branches. The federal common law of foreign relations is a paradigmatic example of "prerogative" federal common law made by judges in the absence of political branch guidance on the basis of independent judicial assessments of federal interests. n205 It requires judges to determine on a case-by-case basis both when the foreign relations interests of the United States require a federal foreign relations law, and the content of that law. n206 Such prerogative judicial lawmaking occurs in relatively few contexts because of the familiar host of separation of powers concerns that it raises: It intrudes on political branch prerogatives to make federal law; it circumvents the numerous procedural requirements for federal foreign relations lawmaking, thereby lowering the costs of federal lawmaking and diminishing the goals promoted by such costs; and it lacks democratic legitimacy. n207

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n205. See Merrill, supra note 21 (explaining and critiquing judicial prerogative lawmaking power).

n206. See supra notes 46, 51-56 and accompanying text.

n207. See Merrill, supra note 21, at 349-50. Some might view these separation of powers difficulties as relatively insignificant because Congress retains the power to override judicial decisions in this context. This is true, but it is also true that Congress can override state acts that intrude on federal prerogatives in foreign affairs. In neither case does the availability of a (non-costless) congressional override warrant an otherwise unjustified intrusion on political branch power in the first place. And since both the federal common law of foreign relations and state foreign relations activity can intrude on the prerogatives of the federal political branches, the goal of analysis should be to identify which intrusion is worse, all things considered.

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These standard concerns appear to have special force in the foreign relations context. The fine-grained foreign relations determinations required by the federal common law of foreign relations are "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." n208 Judges generally lack foreign relations information and expertise. n209 But even if they had access to the information possessed

by the political branches and even if foreign relations training were a prerequisite to judicial service, they still would not be well-suited to make such determinations. Judges lack national political accountability. They are incapable of the centralized decisionmaking that is thought to be so important in foreign relations. n210 And the nature of the judicial process imposes further limitations:

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n208. Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948). See also Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative...Departments.").

n209. See Jonathan I. Charney, Judicial Deference in Foreign Relations, 83 Am. J. Int'l L. 805, 810 (1989).

n210. For a summary of the reasons why centralization is thought to be so important to foreign relations decisionmaking, and an analysis of why federal courts are so deficient in this regard, see John Yoo, Federal Courts as Weapons of Foreign Policy: The Case of the Helms-Burton Act, 21 Hastings Int'l & Comp. L. Rev. 101, 119-23 (1997).

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Courts tend to establish rules of more-or-less general applicability, which can only relate to the needs of foreign policy grossly, and on the basis of assumptions and generalizations hardly consonant with flexibility, currentness, and consistency. On the other hand, when the courts do attempt to differentiate, distinguish, and make exceptions, they - unlike the Executive - must deal in doctrines, must justify in reasoned opinion. n211

These same concerns underlie the political question, act of state, and related judicial abstention doctrines in foreign affairs. n212 Taken [*1669] alone, they counsel caution about the development of a judge-made federal foreign relations law.

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n211. Henkin, supra note 41, at 826.

n212. See generally Charney, supra note 209 (outlining and assessing judicial deference and abstention in foreign affairs cases); see also Curtis A. Bradley, Territorial Intellectual Property Rights in an Age of Globalism, 37 Va. J. Int'l L. 101, 112 & n.49 (1997) (arguing that same concerns underlie presumption against extraterritorial application of federal law)..

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Nonetheless, these concerns need not affect the legitimacy of the federal common law of foreign relations. Although federal courts might be generally unsuited to make federal foreign relations law on both legitimacy and competence grounds, the adverse consequences of state-by-state regulation in the face of

federal political branch silence might be worse. States suffer from many of the same disabilities as federal courts in this context. Moreover, federal courts, in contrast to the states, have independence from local political processes and, as a branch of the national government, are likely to be more sensitive to national foreign relations interests. Even in the absence of strategic behavior by the states, one might think that, all things being equal, suboptimal but uniform federal judge-made regulation of foreign relations is preferable to the nonuniformity inherent in state-by-state regulation of a foreign relations issue. n213 Finally, the federal common law of foreign relations is designed to protect political branch prerogatives in foreign relations that the political branches themselves are structurally unsuited to protect. Any remaining concerns about the legitimacy or competence of the federal common law of foreign relations are thus mitigated by the political branches' ability to override judicial errors in the development of such law.

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n213. Cf. Redish, supra note 56, at 135 ("The need for uniformity in the law affecting foreign nations is clear, and application of state law would preclude the attainment of this uniformity.").

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The best justification for the federal common law of foreign relations, then, is that it sets aside certain separation of powers and institutional competence concerns for the sake of more important national uniformity values. n214 The remainder of this Part [*1670] provides a much different account of how these separation of powers and federalism concerns play out.

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n214. Some might believe that if there is no federalism objection to the federal common law of foreign relations because federal authority is exclusive, then separation of powers objections to the doctrine are irrelevant. This reasoning seems incomplete. If the federal lawmaking power in question is an exclusive prerogative of the federal political branches, then an intrusion by either the states or the federal courts raises constitutional difficulties. One might turn the standard objection on its head: Because federal courts are barred by separation of powers from making federal foreign relations law, any federalism objection to the states doing so should be monitored and redressed by the political branches themselves. Of course, the federal common law of foreign relations might be less problematic than state-by-state regulation on any number of grounds, and indeed this is the most complete argument for the modern practice. My point is simply that thiscomparative cost analysis, rather than conclusory arguments based on federal exclusivity, is appropriate.

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B.

The Waning of the Distinction between Domestic and Foreign Affairs

Foreign relations was traditionally understood to be relations among the national governments of sovereign nation-states. The main concerns of foreign relations so conceived were military and diplomatic issues, and the primary

participants in foreign relations were the executive branches of national governments. In the eighteenth century, as today, these traditional foreign relations functions were thought to be essential attributes of sovereignty. n215 Not surprisingly, the functional case for a self-executing prohibition on subnational foreign relations activity is strongest under this traditional conception. Concurrent authority in these traditional areas would make it especially costly and difficult for the central government to participate effectively in international affairs as traditionally conceived. n216 It would also be especially likely to promote destructive strategic behavior by the states that would undermine a central purpose of the union. Finally, courts can identify traditional foreign relations activities like treaty-making and war-making with relative ease, thus making prohibitions on subnational activity in these contexts relatively easy to enforce. These points were as obvious in the late eighteenth century as they are today, and both Article VI of the Articles of Confederation and Article I, Section 10 of the Constitution at least presumptively barred states from engaging in these traditional foreign relations functions. n217

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n215. See generally Jerrilyn Greene Marston, King and Congress: The Transfer of Political Legitimacy, 1774-1776, at 206-23 (1987) (collecting late 18th-century sources).

n216. Thus, even federal constitutions that provide subnational units with some concurrent traditional foreign relations responsibilities narrowly define these responsibilities and frequently make them subject to prior central government approval. See Federalism and International Relations: The Role of Subnational Units 77-299 (Hans J. Michelmann & Panayotis Soldatos eds., 1990) (analyzing constitutions of Australia, Belgium, Canada, Germany, Switzerland, and the United States).

n217. See Articles of Confederation art. VI; U.S. Const. art. I, 10.

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The federal common law of foreign relations is rarely if ever concerned with such traditional foreign relations functions, because Article I, Section 10, bolstered by 210 years of federal foreign relations enactments, establishes exclusive federal control in these traditional areas. But foreign relations is no longer limited to these traditional categories. Especially in the last thirty years, the increasing integration of the international economy, changes in transportation and communications technology, and the growth of international law and institutions have led to an unprecedented interdependence among nations on a variety of levels. n218 These factors reflect a significant increase in international cooperation, coordination, and regulation that has blurred the distinction between foreign and domestic relations along several axes. For purposes of analyzing the legitimacy of the federal common law of foreign relations, it suffices to describe three aspects of this waning of the distinction: changes in the content of foreign relations and international law; the interdependence of domestic and foreign affairs; and the rise of new foreign relations participants.

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n218. This is the starting assumption for much of modern international relations theory. See, e.g., Seyom Brown, New Forces, Old Forces, and the Future of World Politics 3 (Post-Cold War ed. 1995); Robert O. Keohane & Joseph S. Nye, Power and Interdependence: World Politics in Transition (1977). Of course, many periods throughout history could be said to be marked by unprecedented interdependence because of economic integration, technological innovations, and related factors. My point in the next few pages is simply that this interdependence has reached such a level that a distinction between domestic and foreign relations is no longer feasible as a criterion for allocating jurisdictional authority.

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First, the traditional agenda of foreign relations has been replaced by a variety of issues formerly the concern of domestic governance alone:

Today, in contrast to previous eras of international relations, trade, investment, technology and energy transfers, environmental and social issues, cultural exchanges, migratory and commuting labour, and transfrontier drug traffic and epidemics have forced their way on to the foreign-policy agenda, usually below, but sometimes parallel with, the great issues of national security, military balance, and diplomatic status. This expansion of the field of foreign policy into non-military and non-diplomatic issue-areas began after the First World War, accel- [*1672] erated after the Second World War, and has now become a characteristic feature of global and regional interdependence. n219

This list fails to include the manner in which a nation treats its own citizens, which before World War II was considered a purely "internal" affair, but which today is a central foreign relations concern.

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n219. Ivo D. Duchacek, Perforated Sovereignties: Towards a Typology of New Actors in International Relations, in Federalism and International Relations: The Role of Subnational Units, supra note 216, at 1, 2.

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The change in the agenda of foreign relations is reflected in changes in the content of the legal obligations imposed by public international law. Traditionally, public international law regulated relations among nations. n220 It rarely overlapped with domestic law, and it rarely regulated private activity. n221 Today, by contrast, it frequently regulates both public and private activities that were formerly viewed as domestic concerns. Public international law has pierced the veil of sovereignty to regulate the way in which a nation treats its citizens. n222 It also regulates issues like environmental protection and family law that in prior times were exclusively governed by domestic law. n223

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n220. See Janis, supra note 105, at 245-46.

n221. For exceptions to this generalization, see Louis Henkin, International Law: Politics and Values 169-73 (1995) (customary international law); Louis Henkin, The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations, 107 U. Pa. L. Rev. 903, 911-13 (1959) (treaties).

n222. See supra note 106 and accompanying text.

n223. See Barry E. Carter & Phillip R. Trimble, International Law 1185-1279 (2d ed. 1995) (environmental law); Adair Dyer, The Internationalization of Family Law, 30 U.C. Davis L. Rev. 625 (1997) (family law).

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Second, and relatedly, as the world becomes more interconnected, domestic law and activity increasingly have foreign consequences, and vice versa. This follows in part from the commonplace observation that "as integration increases, the "effect' that local action will have beyond its own local border increases." n224 It also results from the increasing frequency with which "domestic" law is applied in transnational contexts. As we saw above, the application of tort, contract, and property laws in interna- [*1673] tional litigation is sometimes viewed to implicate foreign relations. n225 A related contributing factor is the dissolution of the public/private distinction in international commerce. Private transnational commercial transactions that for most of this century were regulated by domestic law are now regulated by treaty. n226 In addition, foreign sovereigns who once engaged in only public acts now frequently engage in private commercial activity and litigation that were once limited to private parties. n227 Finally, the changing nature of international regulation and concern means that even domestic law that applies to domestic persons for domestic acts can implicate foreign relations. Human rights violations usually take place within a nation's territory and usually involve a nation's own citizens. But as these purely "domestic" acts take on international legal and political significance, they too implicate foreign relations.

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n224. Lessig, supra note 190, at 138. Similarly, external matters increasingly have domestic effects. See Michael Clough, The Changing Character of American Foreign Policy, in Global Changes and Domestic Transformations: New Possibilities for American Foreign Policy 10-11 (1993); Kline, supra note 91, at 331.

n225. See supra notes 76-84 and accompanying text.

n226. See, e.g., New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3; Vienna Convention on Contracts for the International Sale of Goods, Apr. 10, 1980, 19 I.L.M. 668; Rome Convention on the Law Applicable to Contractual Obligations, opened for signature June 19, 1980, 19 I.L.M. 1492.

n227. The modern "restrictive" theory of foreign sovereign immunity, which extends immunity "to sovereign or public acts (jure imperii) of a state, but

not with respect to private acts (jure gestionis)," reflects this fact. See Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments, 26 Dep't St. Bull. 984, 984 (1952) (letter from Department of State Acting Legal Adviser Jack B. Tate to Acting Attorney General Philip Perlman) (May 19, 1952); see also 28 U.S.C. 1605 (1994) (no foreign sovereign immunity from suit in United States court in cases based upon, among other things, certain commercial activities, illegal expropriations, tortious acts, and arbitration agreements).

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Third, as foreign relations has expanded to include formerly domestic concerns, the participants in foreign relations have changed. National governments do not enjoy a monopoly over the conduct of foreign relations as conceived in modern times. Throughout the world, subnational units like the U.S. states have joined international organizations, multinational corporations, and other non-national actors in the conduct and regulation of international affairs. n228 This in part reflects the fact that our conception of foreign affairs has changed to include many [*1674] matters under the traditional control of subnational units. But it also reflects the more active role that subnational units (and other non-national actors) have taken in transnational political and economic affairs. As international markets and means of communication have expanded, subnational units have become increasingly aware of, affected by, and in contact with foreign elements. n229 To the extent that central governments are unable or unwilling to redress local needs and interests, state and local governments have been doing so unilaterally in both the economic n230 and political n231 realms.

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n228. See, e.g., Brian Hocking, Introduction to Foreign Relations and Federal States, in Foreign Relations and Federal States, supra note 91, at 1, 6; Jessica T. Mathews, Power Shift, Foreign Aff., Jan.-Feb. 1997, at 50, 50-52; (1997); Spiro, supra note 62, at 153-54.

n229. See generally Hocking, supra note 228, at 8-30.

n230. See Fry, supra note 91, at 124; Kline, supra note 91, at 329-37. The main forms of state economic activity are the opening of overseas business development offices, international investment incentive programs, unilateral export promotion programs and activities, and governor trade missions. See Kline, supra note 91, at 332-35. As a result of these international economic activities, states have "gained greater interest in a range of issues involving foreign market access, subsidy regulations, trade financing agreements, product certification and customs documentation, and other topics formerly considered the province of specialized national government bureaucracies." Id. at 333.

n231. See Hocking, supra note 228, at 6; Kline, supra note 91, at 338-40. As discussed above, states and localities have in recent years imposed sanctions against oppressive regimes and enacted nuclear-free resolutions. See supra notes 93-95 and accompanying text.

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The rise in subnational foreign relations activity tells us little, of course, about the activity's normative desirability. But we should also avoid the automatic assumption that this development is normatively undesirable. This is especially true because the federal political branches have made clear that, in contrast to traditional foreign relations activities which largely have been federalized through statute and treaty, they do not always, or even usually, prefer federal regulation of these new foreign relations issues. The recent increase in state and local involvement in such issues "has occasioned little reaction from Congress or the Executive." n232 And when the political branches do react, they often choose to protect state interests over foreign relations interests when the two appear to clash. A good example is the United States' recent ratification of a variety of international human rights treaties. n233 These treaties create numerous potential [*1675] conflicts with state law. n234 In the face of international pressure, the President and Senate have consistently attached reservations, understandings, and declarations to these treaties to ensure that they do not preempt or affect inconsistent state law. n235 Similarly, California's worldwide unitary tax on multinational corporations has provoked enormous diplomatic controversy with our closest trading partners since the 1980s. n236 The President negotiated a treaty that would have preempted this law, but the Senate withheld its consent. n237 And in the face of substantial pressure from foreign governments, Congress consistently failed to enact legislation preempting the unitary tax. n238

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n232. Bilder, supra note 202, at 823.

n233. The United States ratified the Convention against Torture and the International Convention on the Elimination of All Forms of Racial Discrimination in 1994, the International Covenant on Civil and Political Rights in 1992, and the Genocide Convention in 1989. See Louis Henkin, U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker, 89 Am. J. Int'l L. 341, 347-48 (1995).

n234. See id. at 348.

n235. See Henkin, supra note 233, at 345-48; Bradley & Goldsmith, supra note 103; Peter J. Spiro, The States and International Human Rights, 66 Fordham L. Rev. (forthcoming 1997). To take a typical example, the Senate attached a "federalism understanding" to the International Covenant on Civil and Political Rights that "serves to emphasize domestically that there is no intent to alter the constitutional balance of authority between the State and Federal governments or to use the provisions of the Covenant to "federalize' matters now within the competence of the States," S. Rep. No. 102-23, at 18-19 (1992), and other reservations and conditions that ensure that "changes in U.S. law in these areas will occur through the normal [federal] legislative process." Id. at 4. For a critical view of these provisions under international law, see Henkin, supra note 233, at 345-46.

n236. For a good account of the controversy, see Brian Hocking, Localizing Foreign Policy: Non-Central Governments and Multilayered Democracy 130-51 (1993).

n237. See id.

n238. See id. In addition, the Supreme Court also declined to strike down the California tax on dormant foreign Commerce Clause grounds. Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298, 324-28 (1994). For further analysis of this decision, see infra notes 327-340.

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Even when the political branches enact preemptive federal foreign relations law, they often do so in a manner that reflects the interests of the states and minimizes intrusion on their prerogatives. When Congress codified the international law standards for determinations of foreign sovereign immunity, it ensured that otherwise-applicable state law would continue to govern the merits of such suits. n239 Similarly, in federal implementing legislation for the Uruguay Round of the General Agreement on Tariffs and Trade ("GATT"), "political sensitiv- [*1676] ity to state sensibilities were [sic] reflected in several ways." n240 Most significantly, the legislation "precluded the agreements from having any direct effect, and indeed required an action by the United States Government for the purpose of striking down a state law." n241 In addition, the federal government has actively cooperated with and supported the unilateral state economic activities described above. n242 The overtly political international activities of states, such as nuclear-free ordinances and state divestment movements, are more controversial. For example, Congress by statute overruled several governors' resistance to allowing the participation of national guard troops in Central American military activities in the mid-1980s. n243 But Congress declined to preempt the most notorious recent state foreign relations activity - state sanctions against South Africa - when it enacted the Anti-Apartheid Act of 1986, n244 and Massachusetts's recent sanctions against Myanmar n245 soon led to similar sanctions by the federal government. n246

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n239. Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. 1606 (1994)); see also Weisburd, supra note 62, at 26-27.

n240. Henkin, supra note 1, at 169. Section 102 of the Uruguay Round Agreements Act contains these protections for state interests. Uruguay Round Agreements Act, Pub. L. No. 103-465, 102, 108 Stat. 4815 (1994) (codified at 19 U.S.C. 3512 (1994)).

n241. David W. Leebron, Implementation of the Uruguay Round Results in the United States, in Implementing the Uruguay Round 175, 228 (John H. Jackson & Alan O. Sykes eds., 1997). The legislation also created a formal consultation role for states in the implementation of the Uruguay Round results, and gave states an opportunity to participate in any World Trade Organization dispute settlement proceeding that challenges state law. For an excellent overview of these issues, see id.

n242. See Enid F. Beaumont, Domestic Consequences of Internationalization, in Globalization and Decentralization: Institutional Contexts, Policy Issues, and Intergovernmental Relations in Japan and the United States, supra note 91, at 381; see also Weisburd, supra note 62, at 26 (citing statutory evidence that "Congress assumes the states will play a role in foreign trade, a role they have eagerly accepted").

n243. National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 522, 100 Stat. 3816, 3871 (codified at 10 U.S.C. 12,301 (1994)), constitutionality upheld, Perpich v. Department of Defense, 496 U.S. 334, 354-55 (1990).

n244. See Kline, supra note 91, at 342.

n245. Mass. Gen. Laws Ann. ch. 7, 22G-22M (West Supp. 1997).

n246. See Exec. Order No. 13,047, 62 Fed: Reg. 13,047 (1997). See also Frank Phillips, State Was in Lead on Burma; Backers of Mass. Law Welcome U.S. Sanctions, Boston Globe, Apr. 23, 1997, at B1; Peter Baker, U.S. to Impose Sanctions on Burma for Repression; Clinton Decision Defies Business Community, Wash. Post, Apr. 22, 1997, at A1.

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In short, foreign relations is no longer "a distinct issue area: it is about "something' and that "something' has come to embrace [*1677] an increasingly large number of issues once assumed to be the preserve of domestic politics." n247 Foreign relations includes many matters traditionally regulated by states. States are increasingly engaged in activities that were formerly the sole responsibility of the federal government. The political branches do not always (or even usually) prefer national foreign relations interests over state interests, or uniform federal regulation to non-uniform state law regulation of an issue, even if the issue provokes complaints from foreign governments.

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n247. Hocking, supra note 236, at 25. We can of course imagine many domestic matters that could not fairly be characterized as involving or affecting U.S. foreign relations. But the number of such matters is shrinking. At the very least, a potential foreign relations interest is raised by any issue that involves a foreign party or transaction, a foreign or international law, or a U.S. law that regulates extraterritorially.

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This analysis casts doubt on the widely held view that the states have no legitimate interest in the regulation of foreign relations. Many who hold this view are misled by the label "foreign relations," which is invariably associated with traditional foreign relations issues and thus with exclusive federal control. But the issues implicated by the federal common law of foreign relations - state common and criminal law, choice of law, procedural law, nondiscriminatory international economic activities, and state human rights activities - differ significantly from traditional foreign relations matters. Concurrent authority over these nontraditional foreign relations matters are much less likely to undermine the United States' ability to participate in international affairs, and much less likely to harm the national foreign relations interest. And, in contrast to state activities in traditional foreign relations contexts, many affirmative benefits accrue from the decentralization of these new foreign relations functions. For example, nontraditional state foreign relations activities such as international trade activity and involvement in the international human rights movement assist both the U.S. government and third parties. n248 Subnational foreign relations initiatives

increased awareness about the United States' economic policies against oppressive regimes in South Africa and Myanmar. n249 [*1678] Similarly, the State and Commerce Departments approve of the manifold state international economic activities presumably because they find that decentralization of these activities serves U.S. interests more effectively than centralized federal control. n250

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n248. See Hocking, supra note 236, at 8-30; John M. Kline, Managing Intergovernmental Tensions: Shaping a State and Local Role in US Foreign Relations, in Foreign Relations and Federal States, supra note 91, at 105.

n249. See supra note 94 and accompanying text.

n250. Cf. Hocking, supra note 236, at 15 ("National governments, confronted by an ever more complex policy environment, struggling to manage their foreign relations in the face of multiple external pressures, may seek to divert these by delegating their responsibilities.").

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In our post-Erie world, a judge-made federal common law of foreign relations in the absence of political branch authorization is only legitimate to the extent that it regulates uniquely federal interests. n251 To the extent that foreign relations as conceived in modern times implicate traditional state interests, prevailing understandings of American federalism suggest that the decision to regulate these matters by federal law be made by the national political branches where state interests are represented. n252 Political protections for state interests are absent when the unelected federal judiciary preempts state law under a foreign relations rationale without any apparent political branch authorization. This explains why the federal common law of foreign relations lacks the nuance, compromise, and accommodation that characterize the relatively few political branch preemptions in these new foreign relations contexts. It also calls into question the normative basis for the federal common law of foreign relations as currently practiced.

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n251. See supra note 34 and accompanying text.

n252. See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550-55 (1985). In recent years, the Supreme Court has expressed incomplete confidence in Garcia's "political process" justification for the elimination of federalism as a judicially enforceable limitation on federal lawmaking power. See Printz v. United States, 117 S. Ct. 2365 (1997); New York v. United States, 505 U.S. 144 (1992); Gregory v. Ashcroft, 501 U.S. 452 (1991); see also John C. Yoo, The Judicial Safeguards of Federalism, 70 S. Cal. L. Rev. (forthcoming 1997) (arguing that these and other recent Supreme Court federalism decisions have overruled Garcia sub silentio). Whether the political process provides full or partial constitutional protection for state interests, the point remains that the political process justification for federal interference with state interests "applies only to congressional (and perhaps, though less forcefully, to presidential) initiatives undertaken at the expense of the state" and not to "such initiatives undertaken by an unelected federal judiciary." Merrill,

supra note 31, at 17.

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It remains true, of course, that concurrent state regulation in the new foreign relations areas can provoke foreign sovereign complaints or otherwise adversely affect U.S. foreign relations [*1679] in a fashion that sometimes argues for a uniform federal rule. n253 Such negative foreign relations externalities are the primary concern underlying the federal common law of foreign relations. But the presence of such externalities does not, by itself, justify federal judicial lawmaking. In the absence of a serious breakdown in the political process, our constitutional democracy normally depends on the elected federal political branches to correct this sort of problem. Political instead of judicial federalization is especially warranted here since the values to be attached to the competing federalism and foreign relations interests appear increasingly contested. n254

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n253. Peter Spiro has recently made the interesting argument that dormant foreign relations preemption is "obsolete" because foreign nations respond to state foreign relations activities by retaliating against the offending state rather than the entire nation. See Spiro, supra note 62, at 161-69. The externalities-reducing logic of dormant foreign affairs preemption is largely (but not completely) undercut to the extent that Spiro's factual premise of tailored retaliation is true. But Proposition 187 and California's unitary tax - Spiro's two examples of this phenomenon, id. at 163-66 - provoked numerous national as well as local protests, and in any event they are, as Spiro concedes, "a slim basis on which to discern a trend." Id. at 166. Nonetheless, if the trend Spiro has identified develops, it will provide another powerful reason for abandoning the federal common law of foreign relations.

n254. Cf. Donald H. Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091, 1112 (1986) ("Many of the same considerations that argue for the essentially unlimited central power - in a nutshell, the complexity and pervasiveness of modern economic activity - argue strongly against treating the central power as exclusive.").

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Many will respond to this latter point by saying that the federal political branches are not reliable in this context. The next Section questions the validity of this response in detail. My aim thus far has been merely to cast doubt on the wooden identity between foreign affairs and exclusive federal power by showing that states retain genuine interests in foreign relations as conceived in modern times, and that the identification and accommodation of competing foreign relations and state interests in the modern era are difficult, uncertain, and contested. Although this analysis undermines a central tenet of the federal common law of foreign relations, it does not constitute a comprehensive argument against the doctrine. The blurring of the distinction between domestic and foreign affairs does not mean that there are no longer uniquely federal foreign relations interests. The [*1680] federal political branches' frequent protection of state interests over foreign relations interests does not suggest that they always wish to protect these interests. And the fact that concurrent authority over nontraditional foreign relations

matters is often good (but sometimes bad) for the U.S. foreign relations process does not by itself say much about the legitimate scope of the federal common law of foreign relations.

So from a functional perspective, the waning of the distinction between domestic and foreign relations makes much harder, but does not resolve, the crucial question whether the foreign relations context requires a shift in the normal burden of inertia from those who want federal regulation of an issue to those who want state regulation. Ultimate resolution of this question requires answers to comparative institutional competence and related federal separation of powers questions that are often overlooked in this context. This is the subject of the next Section.

C.

The Neglected Perspective of Separation of Powers

This Section focuses on the many problems that arise from viewing the federal common law of foreign relations "through the lens of federalism without the filter of the separation of powers." n255 Proponents of the modern practice have so deeply identified foreign relations with federal power that they have failed to consider how the distribution of this power among federal political and federal judicial actors affects its exercise. For reasons of institutional competence and substantive legitimacy, however, the federal political branches are the presumptive makers of all nonconstitutional federal law, especially foreign relations law. n256 The federal common law of foreign relations is an exception to this normal rule of political branch hegemony in foreign relations. It is justified only in order to prevent the states from intruding on political branch prerogatives in foreign relations, and it is always subject to political branch revision. Accordingly, its legitimacy turns on two related assumptions: (a) that [*1681] the federal political branches are incapable of adequately monitoring and redressing state intrusions on their ability to conduct relations with other countries; and (b) that the costs of such state activity in the face of federal political branch silence are greater than the costs associated with federal judicial lawmaking. n257 This Section argues that both of these assumptions are wrong.

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n255. Laurence H. Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies about Federalism, 89 Harv. L. Rev. 682, 683 (1976).

n256. See supra notes 208-212 and accompanying text.

n257. Cf. Saul Levmore, Interstate Exploitation and Judicial Intervention, 69 Va. L. Rev. 563, 570 n.17 (1983) (arguing in dormant Commerce Clause context that "in justifying the legislative costs of reversing [erroneous] judicial intervention, the question is not whether courts are better than Congress at protecting the national interest but rather whether courts are more responsive to the national interest than are state legislatures").

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1.

The Exaggerated Need for the Federal Common Law of Foreign Relations

The federal common law of foreign relations' assumption that the political branches are incapable of monitoring and redressing untoward state foreign relations activity at an acceptable cost is like the one used to justify dormant Commerce Clause preemption. n258 But the analogy is inapposite. The federal political branches have many more resources to monitor and control state intrusions on their foreign relations prerogatives than they do in the context of discrimination against interstate commerce.

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n258. See Ernest J. Brown, The Open Economy: Justice Frankfurter and the Position of the Judiciary, 67 Yale L.J. 219, 222 (1957); Choper, supra note 60, at 1586-87; Julian N. Eule, Laying the Dormant Commerce Clause to Rest, 91 Yale L.J. 425, 435 (1982). Dormant Commerce Clause scholars justify the doctrine on three related grounds: (1) Congress lacks any mechanism to consider the "myriad of state and local rules that may arguably intrude on the national domain," Choper, supra note 60, at 1586; see also Brown, supra, at 222; (2) even if Congress had such a mechanism, individual state discriminations against interstate commerce are relatively unimportant, and thus congressional time-pressures and other factors leading to congressional inertia would prevent full congressional consideration of these issues, Choper, supra note 60, at 1586-87; and (3) even if these structural obstacles could be overcome, "the task of determining on an ad hoc basis the compatibility of isolated local ordinances with the broad demands of the federal system" is more suited to an adjudicative rather than a legislative body, id. at 1586.

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a.

Congress

We have relatively little information about congressional agenda-setting in the foreign relations context, at least outside [*1682] of the international economic arena. n259 Nonetheless, it seems safe to assume that Congress will be much more aware of state activity with adverse foreign relations consequences than it is of state legislation that discriminates against interstate commerce. Most cases of interstate discrimination will be limited to a relatively small geographical area that will not implicate national attention or interest, and thus will have a particularly hard time getting on the political branches' limited legislative docket. This is less true of state activity that provokes foreign relations controversy, which implicates national responsibility, and which often generates national attention. Furthermore, Congress has special committees and subcommittees with permanent staffs devoted to monitoring various aspects of the United States' relations with foreign countries. n260 It can also rely on the President to provide information concerning the existence of disruptive state behavior. n261 As foreign relations comes to include economic and political factors that more directly affect the interests of constituents and organized groups, congressional awareness of state activity harmful to

national foreign relations will only grow.

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n259. See James M. Lindsay & Randall B. Ripley, Foreign and Defense Policy in Congress: A Research Agenda for the 1990s, 17 Legis. Stud. Q. 417, 424 (1992) ("We do not know much about how specific foreign and defense issues get onto the discretionary agenda in Congress.").

n260. For an overview collecting many sources, see id. at 426-29.

n261. See id. at 423-24.

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But even if Congress (or one of its committees) is aware of such state activity, will it redress the problem? This is a complex question that is difficult to answer because we lack a very rich understanding of when or why Congress enacts foreign relations law. n262 The difficulty of the question is exacerbated by the waning of the distinction between domestic and foreign affairs, which makes it difficult to generalize about the foreign relations lawmaking process.

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n262. See id. at 418-420.

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Nonetheless, the following observations seem appropriate. The likelihood of congressional redress for untoward state activity will increase as does the clarity and extent of the threat posed to the national interest. To the extent that state activity is less threatening, some would predict that Congress would be [*1683] less likely to respond, since constituents and organized groups tend to care little about foreign relations issues. n263 But this analysis applies, if at all, only to traditional foreign relations concerns such as foreign sovereign immunity. The GATT and North American Free Trade Agreement ("NAFTA") debates demonstrated that as foreign relations comes to include political and economic factors that more broadly implicate organized interests, the foreign relations lawmaking process will share many of the characteristics of the domestic lawmaking process. As the GATT and NAFTA process showed, states as an interest group will become more active in protecting their interests in these contexts. But as GATT and NAFTA also showed, two countervailing factors create special pressure for the national political branches to federalize such matters. First, the expansion of the category of foreign relations enhances potential federal power and creates new incentives for federal legislators to exercise this power to obtain increased political support from interested political groups. n264 Second, the demands of globalism create pressure for legal uniformity and harmonization that can be achieved most easily at the federal level. n265

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n263. See Eric Ulsaner, A Tower of Babel on Foreign Policy?, in Interest Group Politics 299, 300 (Allan J. Cigler & Burdett A. Loomis eds., 3d ed.

1991).

n264. See Barry Friedman, Federalism's Future in the Global Village, 47 Vand. L. Rev. 1441, 1473-78 (1994); Jonathan R. Macey, Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism, 76 Va. L. Rev. 265 (1990).

n265. See Andreas Falke, The Impact of the International System on Domestic Structure: The Case of American Federalism, 39 Amerikastudien 371, 372, 384 (1994); Friedman, supra note 264, at 1472.

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Although these observations are admittedly general, they suggest that Congress is more likely to address state activity that harms the national foreign relations interest than it is to address other harmful state acts. But even assuming that Congress is relatively nonresponsive in this context, the need for a judge-made foreign relations law still does not follow. This is because there is another federal foreign relations lawmaker: the executive branch. [*1684]

b.

The Executive Branch

The executive branch has special monitoring capabilities and preemptive lawmaking powers when foreign relations is at issue. As for monitoring, it is inconceivable that the executive branch will be unaware of a state's action that adversely affects U.S. foreign relations or unduly burdens the federal government's ability to conduct foreign relations. The President is the primary agent of U.S. foreign relations and the primary organ of communication with foreign governments. n266 And the executive branch receives all foreign government complaints about state activity.

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n266. See Henkin, supra note 1, at 41-45.

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When the executive branch identifies harmful state foreign relations activity, it is much better positioned than Congress to address it. Foreign relations is (and is perceived to be) the President's responsibility. He is thus more accountable for foreign relations problems than Congress, and has a greater interest in redressing state-created foreign relations difficulties. The President also has a massive executive branch bureaucracy at his disposal to monitor and redress such difficulties. Importantly, the executive branch's ability to respond to these difficulties is not burdened by collective action problems to nearly the same degree as Congress. n267

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n267. See Terry M. Moe & Scott A. Wilson, Presidents and the Politics of Structure, 57 Law & Contemp. Probs. 1, 24-28 (1994).

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In addition, the President's unique role in foreign relations enables him to redress unacceptable state foreign relations activity in a variety of ways. First, he exercises special influence on the congressional foreign relations agenda and the content of foreign relations legislation. n268 Second, he or one of his subordi- [*1685] nates can communicate directly with states on behalf of the federal government in order to influence or alter the offensive state activity. n269 Sometimes this communication is nothing more than an informal telephone call to the proper state or local official. Other times the State Department will send a formal letter to the state urging it to cease its offensive behavior. And sometimes the executive branch will file an amicus brief in state court. n270 These means of "informal" presidential control are often employed and often, though not always, successful in changing the offending state behavior. n271

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n268. This is the "two-presidencies" thesis, which suggests that the President has special agenda-setting and legislative-output influence in foreign relations. See Aaron Wildavsky, The Two Presidencies, Trans-action, Dec. 1966, at 7. Wildavsky's thesis has been subject to numerous criticisms. See, e.g., The Two Presidencies: A Quarter Century Assessment (Steven A. Shull ed., 1991). With some exceptions, the consensus today appears to be that the President "is still dominant over the Congress in foreign policy, but it is not the monolithic dominance implied by Wildavsky." Lance T. LeLoup & Steven A. Shull, Congress Versus the Executive: The "Two Presidencies" Reconsidered, 59 Soc. Sci. Q. 704, 717 (1979). And again, the blurring of the distinction between domestic and foreign affairs attenuates the usefulness of the analysis. See Donald A. Peppers, "The Two Presidencies": Eight Years Later, in Perspectives on the Presidency 462, 469 (Aaron Wildavsky ed., 1975).

n269. Legal officers in the State Department reported in telephone conversations with me and my research assistant that the Department lacks specific internal procedures with respect to these informal means of exercising control over state foreign relations activity. See Memorandum from Kristof Hess to Jack Goldsmith (Oct. 31, 1996) (on file with the Virginia Law Review Association). But they acknowledged that the Department does frequently perform this role through informal conversations, formal letters, and amicus participation in courts. For documented examples throughout different periods of American history, see John Bassett Moore, The Principles of American Diplomacy 191 (1918); Stoke, supra note 126, at 151; Ronan Doherty, Note, Foreign Affairs v. Federalism: How State Control of Criminal Law Implicates Federal Responsibility Under International Law, 82 Va. L. Rev. 1281, 1306-07 (1996); Palumbo, supra note 160, at 2-3, 108, 217.

n270. See, e.g., Embassy of Benin v. District of Columbia Bd. of Zoning Adjustment, 534 A.2d 310, 311 (D.C. Ct. App. 1987); Hunt v. Coastal States Gas Producing Co., 583 S.W.2d 322, 334-35 (Tex.) (Steakley, J., dissenting), cert. denied, 444 U.S. 992 (1979).

n271. For recent examples of executive intervention that did not succeed, see Doherty, supra note 269, at 1306-07.

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Third, the President has limited but important federal lawmaking powers that enable him, on his own, to preempt state law that adversely affects the nation's foreign relations or the political branches' ability to conduct such relations. Some of these powers derive directly from the Constitution itself. For example, incident to his power to recognize foreign governments, n272 the President can enter into international agreements that preempt state law. The most famous instance is the Litvinov Agreement, which officially recognized the Soviet Union and assigned all Soviet property in the United States to the federal government. This "executive agreement" preempted inconsis- [*1686] tent state property and creditor law. n273 It also ended state court uncertainty about the domestic effect of the Soviet Union's extraterritorial confiscations. n274

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n272. This power derives from the President's Article II power to receive ambassadors. U.S. Const. art. II, 3.

n273. See United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324, 331 (1937).

n274. See Jaffe, supra note 164, at 180-98 (collecting and analyzing pre-Litvinov Agreement state court cases).

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Much more significant than the President's constitutionally derived powers are the broad and numerous foreign relations lawmaking powers delegated to the executive by Congress. n275 Congress has delegated these powers to the executive precisely because the President has access to superior expertise and because structural advantages allow the President to take quick and decisive action. The broadest such delegation is the International Emergency Economic Powers Act ("IEEPA"). n276 Presidential lawmaking power under IEEPA is triggered by "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States." n277 IEEPA enables the President to respond quickly to suspend or invalidate state law whose application would interfere with or impede the federal government's conduct of foreign relations. The best known example is President Carter's invocation of IEEPA to lift state-law judicial attachments on Iranian assets and suspend private (largely state-law governed) claims against Iran as part of the deal to secure the release of the hostages in Iran. n278

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n275. For a good general introduction, see Harold Hongju Koh & John Choon Yoo, Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law, 26 Int'l Law. 715 (1992).

n276. 50 U.S.C. 1701-06 (1994).

n277. Id. 1701(a).

n278. This action was upheld by the Supreme Court in Dames & Moore v. Regan, 453 U.S. 654 (1981).

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The President's IEEPA power is not limited to such emergency situations. Presidents "have declared national emergencies with little regard to whether a real emergency has actually existed," n279 and courts have broadly construed the IEEPA delegation. n280 But [*1687] the IEEPA power is not limitless, and it would not be politically expedient for the President to exercise it fully or frequently. Nonetheless, its availability, in combination with other statutory bases for emergency federal foreign relations lawmaking by the executive, n281 attenuates concerns that state activity will create a foreign relations crisis that cannot be immediately addressed by a federal political branch.

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n279. Koh & Yoo, supra note 275, at 744.

n280. See Dames & Moore, 453 U.S. at 672-74. For criticisms of these broad readings of IEEPA, see Koh, supra note 184, at 138-43; Jules Lobel, Emergency Power and the Decline of Liberalism, 98 Yale L.J. 1385, 1417-18 (1989).

n281. See, e.g., Trading with the Enemy Act, 50 U.S.C. app. 1-44 (1994); Defense Production Act, 50 U.S.C. app. 2061-2171 (1994); Export Regulation Act, 50 U.S.C. app. 2401-20 (1994).

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c.

Residual Concerns

It is hard to imagine an area in which the political branches together exercise more control over state activity than in foreign relations. The President's monitoring, consultation, and lawmaking powers, in combination with Congress's manifold powers, mean that the federal government can respond more quickly and effectively to untoward state foreign relations activity than to other untoward state activities. In addition, changes in global politics and the global economy appear to have created unusual incentives for the federal political branches to nationalize a variety of matters currently under state control. n282 In this light, Professor Henkin's assessment from 1964 rings even truer today: "The foreign relations of the United States do not cry for the courts to fill an obvious lack of law left for them by the Constitution or by necessary implication from the words or silences of the political branches." n283

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n282. See supra notes 264-265 and accompanying text.

n283. Henkin, supra note 41, at 817-18. In the article from which this quotation is drawn, Professor Henkin was skeptical about the constitutional basis for, and necessity of, the federal common law of foreign relations

articulated in Sabbatino. Id. at 816-18. Although Henkin has modified his views about the legitimacy of the federal common law of foreign relations over the years, compare id. with Henkin, supra note 1, at 139-40, he has consistently acknowledged the nuances in this relationship and the important role played by the states in the conduct of U.S. foreign relations, see id. at 140, 150-51, 165, & 436 n.64.

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Some will nonetheless insist that there is a need for judge-made foreign relations law because congressional inertia remains a problem and the President has a crowded agenda and will not always be politically willing or legally able to exercise foreign [*1688] relations lawmaking powers. To take a much-cited example, California's unitary method for taxing multinational corporations provoked numerous foreign sovereign complaints and threats directed to the national government. n284 The political branches were either unwilling or unable to preempt the offensive state activity. In this and other contexts, the argument goes, important federal foreign relations interests would be unprotected if judge-made foreign relations law were eliminated.

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n284. See supra notes 236-238 and accompanying text.

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There are three responses to this argument. The first is to be skeptical of the existence of important federal foreign relations interests that the political branches, even with special incentives and enhanced lawmaking capacities, do not protect with enacted federal law. n285 The notion of such unprotected foreign relations interests is frequently invoked but rarely explained. Such a notion has little to support it but contested intuition that likely represents little more than substantive disagreement with the state law in issue. How do we know such unprotected federal foreign relations interests exist? What are the criteria for their identification? Proponents of the federal common law of foreign relations offer no answers. The most accurate and reliable measure of these interests is the national political process, especially as these interests become more difficult to identify with certainty. As we have seen, there is little reason to think that this process does not function properly to protect these interests.

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n285. See Merrill, supra note 21, at 352-53.

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In this light, the oft-stated but little-analyzed notion that state activity prevents the federal government from speaking with "one voice" in foreign relations makes little sense. The federal government itself rarely speaks with one voice in foreign relations. n286 Foreign relations law is replete with struggles between the statute-makers, the treaty-makers, the President, and sometimes the courts, for control of the federal foreign relations voice. n287 As Edward Corwin correctly noted, the Constitution's [*1689] allocation of foreign relations power among the political branches is an "invitation to

struggle" for control of the conduct of U.S. foreign relations. n288 The Constitution does not purport to limit activity that affects foreign affairs to a single person or voice; at best, it provides a mechanism for final authoritative decisionmaking in foreign relations. n289 In addition, it is difficult to see how state activities could ever prevent the federal government from exercising its foreign relations powers. The federal political branches always retain the power to preempt state law or activity. n290 Any argument that federal preemption is not always available assumes a breakdown in the federal political process of precisely the sort that I have just questioned.

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n286. See Ralph G. Steinhardt, Human Rights Litigation and the "One-Voice" Orthodoxy in Foreign Affairs, in World Justice? U.S. Courts and International Human Rights 23, 27 (Mark Gibney ed., 1991).

n287. Indeed, the executive branch itself often speaks with more than one voice in foreign relations. In many contexts, the Defense Department, the State Department, the National Security Council, and increasingly the Departments of Commerce and Treasury, and the United States Trade Representative, all compete for control of the foreign relations agenda. For examples from the trade context, see Paul B. Stephan III, Don Wallace, Jr. & Julie A. Roin, International Business and Economics: Law and Policy 773-75 (2d ed. 1996).

n288. Edward S. Corwin, The President: Office and Powers, 1787-1984 at 201 (Randall W. Bland, Theodore T. Hindson & Jack W. Peltason eds., 5th rev. ed. 1984).

n289. See id. at 200-201.

n290. See Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 80-81 (1993) (Scalia, J., concurring) ("No state law can ever actually "prevent this Nation from "speaking with one voice"'...or "interfere with [the United States'] ability "to speak with one voice"'....The National Government can always explicitly pre-empt the offending state law." (citations omitted)).

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The second response is that these state foreign relations activities remain subject to independent constitutional prohibitions. n291 Many state laws that create foreign relations controversy are in some fashion discriminatory - either against aliens, or against foreign countries, or against foreign commerce. n292 A number of constitutional provisions - for instance, the Equal Protection and the dormant Commerce Clauses - are designed to redress the evils [*1690] that inhere in these and related forms of discrimination. My analysis does not question the validity of these doctrines, which are available to invalidate state actions that offend constitutional principles on grounds other than their foreign relations consequences. n293 It merely questions whether there is a need for an additional judicially enforced limitation based on the foreign relations quotient of state action that survives antidiscrimination scrutiny.

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n291. Some might object that the availability of constitutional prohibitions should not be used as an argument in favor of nonconstitutional lawmaking like

the federal common law of foreign relations. For two reasons, I do not think this objection applies here. First, the labels "constitutional" and "nonconstitutional" are misleading in this context. Although the federal common law of foreign relations is subject to congressional revision, it is still a constitutional doctrine to the extent that it (like, for example, much of Article I, 10 of the Constitution) reverses the normal burdens of inertia for federal lawmaking. Second, I have argued that the federal common law of foreign relations is illegitimate independent of the availability of related constitutional antidiscrimination protections. I invoke these latter doctrines merely to mitigate the concerns of those unconvinced by my argument.

n292. See supra note 97 and accompanying text.

n293. The analysis does call into question the "one voice" component of the dormant foreign Commerce Clause. See supra notes 85-89 and accompanying text. But the antidiscrimination component, which is central, would still apply.

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Finally, even if the concerns about federal political branch responsiveness to state foreign relations activity had some validity, they would not, by themselves, justify the federal common law of foreign relations. Assuming that it makes sense to speak of federal foreign relations interests that are unprotected by the national political process, it remains an open question whether federal courts can adequately, and at an acceptable cost, protect those interests while accommodating competing interests, including the legitimate interests of states. This is the subject of the next Subsection.

2.

The Overlooked Costs of the Federal Common Law of Foreign Relations

The federal common law of foreign relations is designed to protect political branch prerogatives in foreign relations and, more broadly, to protect the national foreign relations interests. Before assessing the theoretical arguments as to whether courts can perform this function, it is worth noting that in most cases involving the federal common law of foreign relations, courts do not in fact perform this function. They do not consult related federal foreign relations enactments or attempt to assess the actual content of national foreign policy on the matter. Rather, like most academic proponents of the federal common law of foreign relations, they appear to make an unguided intuitive judgment about the "foreign relations" quotient of a particular case. Once this intuitive judgment has been satisfied, they conclude, without further analysis, that the issue must be governed [*1691] by uniform federal law. And the content of this law, like the basis for judicial federalization, is rarely (if ever) informed by an analysis of the actual foreign relations policies of the political branches. n294

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n294. The examples here are too numerous too cite. For representative cases, see Zschernig v. Miller, 389 U.S. 429 (1968); Republic of Philippines v. Marcos, 806 F.2d 344 (2d Cir. 1986), cert. denied sub nom. New York Land Co. v.

Republic of Philippines, 481 U.S. 1048 (1987).

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This criticism is important, because it suggests that courts do not engage in the tasks necessary to legitimate the practice. But could they, even in theory? Is there any reason to think that federal courts could, in the absence of political branch guidance, accurately determine when and how the foreign relations interests of the United States require preemption of state law? In answering this question, it is useful to compare the federal common law of foreign relations with Article I, Section 10's structurally similar requirement that states not keep troops or ships of war absent prior congressional consent. Both prohibitions on state activity are motivated by the fear that concurrent authority encourages states to engage in strategic behavior at the expense of the national foreign relations interest. And both address this fear by raising the costs of such unilateral state action in a manner - a requirement of prior national consent - that ensures that the state does not produce unacceptable foreign relations externalities.

But there are important differences. The prohibitions in Article I, Section 10 have a well-defined scope; their enforcement involves the relatively straightforward inquiry as to whether the state has kept troops or ships of war. The federal common law of foreign relations, by contrast, contemplates that courts will, in the absence of political or constitutional guidance: (a) identify the foreign relations interests of the United States; (b) decide whether the state activity unduly interferes with these interests or with the political branches' management of these interests; and, if so, (c) craft a federal law that accommodates these interests with other competing interests, including the interests of the states. The latter tasks are much more open-ended and much more demanding of the judiciary than the Article I, Section 10 [*1692] inquiry. n295 And as we have seen, the potential scope of the federal common law of foreign relations is much broader. n296

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n295. A similar point can be made by comparing the dormant Commerce Clause with the federal common law of foreign relations. Dormant Commerce Clause jurisprudence is often criticized for having high decision and error costs. And yet this jurisprudence imposes many fewer demands on judges than the federal common law of foreign relations. The essential purpose of the dormant Commerce Clause cases - to keep the channels of interstate commerce running smoothly without disruption from discriminatory state laws - is relatively straightforward, and American judges have at least a rudimentary understanding of domestic commerce and domestic political considerations tempting states to favor their own citizens and corporations. By contrast, questions touching on foreign relations are infinite in their variety and potential complexity, and judges tend to have very little understanding of these issues.

n296. See supra Section I.C.; see also Weisburd, supra note 62, at 20 ("To argue that federal common law must govern whenever a case implicates the international relations of the United States is to provide a basis for taking all cases with international elements out of the state courts."); Linde, supra note 143, at 606 ("Independent judicial policing of all state laws affecting foreign interests would in the modern world leave few fields untouched....").

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The complex judgments that inhere in the federal common law of foreign relations suggest that courts will often err in creating this law. It is difficult to demonstrate this point directly without appealing to contested intuitions, because there is no settled independent measure of which state foreign relations activities should be preempted. This is precisely the problem in this area. Even without such an independent measurement, however, there is little reason to believe that federal courts can accurately make the judgments demanded by the federal common law of foreign relations. First, by definition, federal courts lack guidance by the political branches. Second, the judgments that inhere in judicial lawmaking in this context are quintessential standards. n297 Standards are supposed to gain case-by-case accuracy at the price of ex ante predictability by requiring the decisionmaker to make fine-grained contextual assessments of the values in issue. But the success of a standard depends on the legal decisionmaker's ability to make intelligent and accurate judgments. n298 For the well-known reasons summarized above, n299 judges are particularly unsuited to make the fine-grained for- [*1693] eign affairs judgments that inhere in the federal common law of foreign relations.

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n297. See Cass R. Sunstein, Problems With Rules, 83 Cal. L. Rev. 953, 964-65 (1995).

n298. See id. at 964-65.

n299. See supra notes 208-212 and accompanying text.

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This suggests that courts will often commit errors in the development of a federal common law of foreign relations. Two types of error are possible: mistaken application of state law when a federal common law rule would be appropriate, and mistaken development of federal common law when state law should be applied. n300 Although both types of error are mitigated by the possibility of congressional override, such an override faces well-known hurdles. n301 If these hurdles applied with equal force to both types of error, they would tell us very little. n302 There are plausible reasons, however, to think the hurdles to political branch overrides are more easily surmounted with respect to adverse state foreign relations activity than with respect to erroneous judicial federalizations of state law.

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n300. Moreover, a court might correctly decide that federal law should govern, but impose a rule that does not accurately capture the federal foreign relations interest.

n301. See William N. Eskridge, Jr., Interpreting Legislative Inaction, 87 Mich. L. Rev. 67, 98-99 (1988); Daniel J. Meltzer, State Court Forfeitures of Federal Rights, 99 Harv. L. Rev. 1128, 1169-70 (1986); Merrill, supra note 31, at 22-23; Allan C. Hutchinson & Derek Morgan, Calabresian Sunset: Statutes in the Shade, 82 Colum. L. Rev. 1752, 1764-66 (1982) (book review).

n302. Cf. Meltzer, supra note 301, at 1170 (legislative inertia argument is a "double-edged sword").

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Section III.C.1 tried to explain why the hurdles to political branch correction of untoward state foreign relations activity are relatively insignificant. The likelihood of federal foreign relations lawmaking by the political branches increases with the threat state activity poses to the federal foreign relations interest. n303 Because political branches' responsiveness will be at its height in such cases, we can worry less about courts erroneously applying state law when they should have developed federal common law.

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n303. Cf. Eule, supra note 258, at 436 (making same point in context of dormant Commerce Clause).

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The same is not true with respect to judicial errors in the creation and application of a federal common law of foreign relations. An error in this context results when a court federalizes an issue that does not in fact implicate the national foreign relations interest in a way that warrants a federal rule. This type of judicial [*1694] error - for example, the erroneous federalization of tort or contract law, or of a private international law rule - will not itself typically affect U.S. foreign relations interests. Such an error will not trigger the political branches' special means to monitor and control adverse foreign relations activity, and thus will likely encounter the usual hurdles to congressional override. The states, of course, form a powerful interest group adept at overcoming such hurdles. n304 But they still face the burden of inertia. This burden is almost certainly heightened by globalization's countervailing pressure for uniform federal laws. n305 In addition, much of judge-made foreign relations law has a misleading constitutional flavor that might dissuade the political branches from attempting to overrule it. Congress is especially unlikely to overrule lawmaking by the lower courts, where the large majority of this law is made. n306

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n304. See William N. Eskridge, Jr., Dynamic Statutory Interpretation 153 (1994) [hereinafter Eskridge, Dynamic Interpretation]; William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331, 360 (1991).

n305. See supra notes 265, 270-271 and accompanying text.

n306. See Eskridge, Dynamic Interpretation. supra note 304, at 151; Robert A. Katzmann, Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory, 80 Geo. L.J. 653, 662 (1992).

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There is thus good reason to believe that an asymmetry in likely political branch responses privileges judicial mistakes in creating a federal common law

of foreign relations. The doctrine also suffers from other serious problems. Its standard-like inquiries suggest that its promise of uniformity in federal foreign relations law is illusory. There is every reason to expect that judges who lack training and expertise in foreign relations will reach different conclusions about the foreign relations consequences of particular state acts. This problem is exacerbated by the fact that most of the federal common law of foreign relations is made by the relatively decentralized lower federal and state courts. Casual empiricism confirms the prediction of nonuniformity. The many cases in which judges federalize an issue under a foreign relations rubric are matched by many similar cases in which judges, because they view the foreign relations effects of applying state law differently, decide to apply state law. n307 [*1695] This means that both the source and the content of the law are uncertain in these cases - hardly the good the federal common law of foreign relations is thought to serve.

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n307. See, e.g., Trojan Techs., Inc. v. Pennsylvania, 916 F.2d 903, 905-09 (3d Cir. 1990) (holding that Pennsylvania's buy-American statute was not preempted); Toronto-Dominion Bank v. Hall, 367 F. Supp. 1009, 1013-14 (E.D. Ark. 1973) (applying state law to find that reciprocity is not a condition to giving conclusive effect to a foreign judgment in Arkansas).

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The federal common law of foreign relations also fails to serve its stated goal of ensuring that the foreign relations decisionmaking process is centralized in the federal political branches. The availability of federal judicial lawmaking can only discourage the federal political branches from exercising their constitutionally mandated foreign relations responsibilities. Moreover, it encourages interested groups to seek novel federal foreign relations law in the courts, where the hurdles to lawmaking are generally lower than in the political branches. It is thus no surprise that foreign sovereigns and others with foreign relations interests increasingly participate in federal courts as parties and amici, announcing their interest in, or offense at, the state action in question. This gives foreign sovereigns potentially significant influence over the shaping of federal foreign relations law, since a complaint by a foreign sovereign about the application of state law is strong evidence of a foreign relations concern, and a court's rejection of such a claim might itself cause offense.

All these difficulties with the federal common law of foreign relations - its tendency to ignore federal enacted law, its casual inquiry into actual U.S. foreign relations interests, its tendency to make errors in identifying and accommodating these interests, its inherent nonuniformity, its decentralizing effects on the federal foreign relations lawmaking process, and its encouragement of foreign sovereign amici activity - are well illustrated by a pair of recent Fifth Circuit decisions.

In Torres v. Southern Peru Copper Corp., n308 Peruvian citizens brought a state law tort suit in a Texas state court against American and foreign corporations (including the named defendant, Peru's largest mining company) for environmental damage that occurred in Peru. In Marathon Oil Co. v. Ruhrgas, A.G., n309 plaintiffs sued Germany's largest gas company in a Texas state court [*1696] for a variety of business-related torts arising out of agreements to

explore for gas in the North Sea. Defendants in both cases removed to federal court on the ground that the private law claims arose under the federal common law of foreign relations. n310 Unsurprisingly, the governments of Peru and Germany both supported these contentions with letters of protest to the State Department and amicus briefs that emphasized that the suits would adversely affect their relations with the United States. n311 The same panel of the Fifth Circuit held that plaintiffs in Torres stated a claim under the federal common law of foreign relations but that plaintiffs in Marathon Oil did not. n312

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n308. 113 F.3d 540 (5th Cir. 1997).

n309. 115 F.3d 315 (5th Cir. 1997).

n310. Defendants' ultimate goal in both cases was seeking a forum non conveniens dismissal that could more easily be obtained in federal, rather than state, court.

n311. Marathon Oil, 115 F.3d at 320; Torres, 113 F.3d at 542.

n312. Marathon Oil, 115 F.3d at 320; Torres, 113 F.3d at 543.

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The key to the conclusions reached in these cases was the court's differing assessment of the foreign relations consequences of each suit. In Torres, the court was "alerted...to the foreign policy issues" in the case by Peru's "vigorousness in opposing the action." n313 With no apparent input from the executive branch and no analysis of U.S.-Peruvian relations, the court concluded that the complaint in Torres "raises substantial questions of federal common law by implicating important foreign policy concerns." n314 This was so, the court explained, because the Peruvian government's close involvement with, and regulation of, the Peruvian mining industry's harvest of Peruvian natural resources meant that the lawsuit "strikes not only at vital economic interests but also at Peru's sovereign interests." n315 By contrast, in Marathon Oil, the court concluded that the suit would not "impact severely the vital economic interests of a highly developed and flourishing industrial nation such as Germany" and did not "strike at [Germany's] sovereignty." n316 The court did not explain why a suit against Peru's heavily regulated but privately owned copper company implicated important United States for- [*1697] eign relations interests, while a suit against Germany's largest but less regulated gas company did not. n317 Its independent analysis of the Torres lawsuit's effect on U.S. foreign relations led it to overlook and act in a manner inconsistent with the requirements of the Foreign Sovereign Immunities Act ("FSIA"). n318 And as is to be expected when decentralized courts make federal common law on the basis of independent foreign relations judgments, the federal common law rule announced in Torres is inconsistent with scores of very similar cases in which federal jurisdiction was denied. n319

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n313. Torres, 113 F.3d at 542-43. The court was careful to emphasize that Peru's amicus participation "does not, standing alone, create a question of federal law." Id.

n314. Id. at 543.

n315. Id.

n316. Marathon Oil, 115 F.3d at 320.

n317. The court clearly believed that Peru had a more intimate relationship with the Southern Peru Copper Corporation than Germany did with Ruhrgas, and that Peruvian copper was a more important national resource for Peru than North Sea gas was to Germany. But its analysis further assumed that (a) the Torressuit would have a profound adverse effect on Peru, Torres, 113 F.3d at 543, while the Marathon Oil suit would have little effect on Germany, and therefore, that (b) the suit in Torres thus implicated important U.S. foreign policy interests while the suit in Marathon Oil did not, Marathon Oil, 115 F.3d at 320. These assumptions lacked any apparent factual basis.

n318. 28 U.S.C. 1330, 1602-11 (1994). The FSIA bars all U.S. courts from exercising jurisdiction when, according to its provisions, a foreign sovereign is immune from suit. Id. 1330(a), 1604. It also establishes the exclusive basis for federal jurisdiction when, according to its terms, foreign states are not immune from suit. Id. 1330; see also Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989). The FSIA specifies that when a foreign sovereign's immunity from suit is denied and the case goes forward, otherwise-applicable state law governs the merits. 28 U.S.C. 1606 (1994). The jurisdictional and immunity provisions of the FSIA are carefully limited to (among other things) suits against a foreign state or an agency or instrumentality of foreign states, which is defined to include a separate legal person, a majority of whose shares is owned by the foreign state. Id. 1603(b). Entities that are closely related to a foreign sovereign but who do not satisfy this definition cannot invoke the FSIA's jurisdictional or immunity provisions. See Joseph W. Dellapenna, Suing Foreign Governments and Their Corporations 21-24 (1988). Congress believed the FSIA's provisions sufficed to "serve the interests of justice and...protect the rights of...foreign states...in United States [state and federal] courts." 28 U.S.C. 1602 (1994). The court in Torresignored these provisions and effectively declared that they did not suffice to protect the rights of foreign states. Based on its own case-specific analysis of the requirements of U.S. foreign relations, the court established a mechanism by which foreign corporations with connections to foreign states too attenuated to invoke the jursidiction of the FSIA could avail themselves of federal jurisdiction and, even more generously than the FSIA, of the protections of federal judge-made law rather than otherwise applicable state law. Torres, 113 F.3d at 543.

n319. See, e.g., Gates v. Victor Fine Foods, 54 F.3d 1457, 1461, 1465 (9th Cir.), cert. denied sub nom. Fletcher's Fine Foods, Ltd. v. Gates, 116 S. Ct. 187 (1995); Edlow Int'l Co. v. Nuklearna Elektrarna Krsko, 441 F. Supp. 827, 831-32 (D.D.C. 1977); United Arab Shipping Co. v. Al-Hashim, 574 N.Y.S.2d 743, 744 (App. Div. 1991).

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Torres and Marathon Oil together illustrate the difficulties that inhere in a federal common law of foreign relations. But what about the objection that the problems created by residual state control of such cases - the threat of fifty

different voices in foreign affairs - are more significant? The intuition that supports this objection is powerful. I hope by now that the misconceptions on which it rests are clear. There is little reason to think that state control over matters not governed by enacted federal law affects U.S. foreign relations in a way that warrants preemption. Of course, states - like corporations, individuals, and federal government officials - can pursue their self-interest to the detriment of U.S. foreign relations. The political branches, however, are quite capable of identifying and responding to any adverse consequences of this behavior. A supplemental federal judicial lawmaking power discourages such political branch action while creating serious problems of its own. It is worth remembering that only the federal government (including federal courts), and not the states, makes federal foreign relations law. n320 Many of the just-identified problems of a federal common law of foreign relations - disincentives for political branch action in this context, decentralization of the federal foreign relations lawmaking process, and nonuniformity of federal foreign relations law - are thus not present in a world governed by state law in the absence of a controlling federal enactment.

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n320. State courts can (and must) apply federal common law when such law is legitimate. My argument is that it is not legitimate.

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## IV.

## Assessment and Objections

After briefly summarizing the normative case for the elimination of the federal common law of foreign relations, this Part considers the significant support for this conclusion in recent Supreme Court decisions. It then addresses two general objections to my analysis.

### A.

### Is the Supreme Court Moving in This Direction?

The best argument for the federal common law of foreign relations is that its federalism benefits are so important that they [*1699] outweigh separation of powers and judicial competence concerns raised by the practice. n321 I have argued that the federal common law of foreign relations represents a sharp break with 175 years of historical practice, n322 that the evils addressed by the doctrine are overstated, n323 that the political branches have relatively little need for federal judicial assistance in protecting their foreign relations prerogatives, n324 and that the federal courts are not well-suited to provide such assistance in any event. n325 In light of the likely asymmetry in political branch responses to judicial errors in the development of federal foreign relations law, n326 I conclude that the federal common law of foreign relations lacks justification, and should be abandoned.

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n321. See supra Section III.A.

n322. See supra Part II.

n323. See supra Section III.B.

n324. See supra Section III.C.1.

n325. See supra Section III.C.2.

n326. See id.

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Several developments in the Supreme Court since the birth of the federal common law of foreign relations in the 1960s support this conclusion. The most significant development came in Barclays Bank PLC v. Franchise Tax Board of California. n327 At issue there was California's method for taxing multinational corporations. Opponents of the state's "worldwide combined reporting" had tried unsuccessfully for over thirty years to convince the federal political branches to preempt it. n328 Unsurprisingly, their failure in the political process prompted suit in federal court. There, plaintiffs claimed that the statute "impaired federal uniformity in an area where federal uniformity is essential" by "preventing the Federal Government from "speaking with one voice' in international trade." n329 In support of this claim, they relied heavily on Zschernig, n330 the enormous diplomatic contro- [*1700] versy provoked by the California scheme, n331 amicus filings from foreign nations alleging offense at the California law, n332 and a variety of executive branch pronouncements. n333

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n327. 512 U.S 298 (1994).

n328. See id. at 324-25 & n.23. For a general account of these efforts, see Hocking, supra note 236, at 130-51.

n329. 512 U.S. at 320 (quoting Japan Line Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979) (quoting, in turn, Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976))).

n330. See Petitioner's Brief at 42-43, Barclays Bank (No. 92-1384).

n331. See id. at 43. The amicus brief filed by our closest trading partners cited dozens of Diplomatic Notes and other formal communications to the United States complaining about the California practice. See Brief of the Member States of the European Communities (Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom) and the governments of Australia, Austria, Canada, Finland, Japan, Norway, Sweden, and Switzerland as Amici Curiae in Support of Petitioner app., Barclays Bank (No. 92-1384).

n332. See, e.g., id.; Brief of the Government of the United Kingdom as Amicus Curiae in Support of Petitioner, Barclays Bank (No. 92-1384); see also Barclays Bank, 512 U.S. at 324 n. 22 (cataloging reactions of foreign governments to

California's method of taxation).

n333. See Barclays Bank, 512 U.S. at 328 & n.30.

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The Court rejected the challenge and in the process gutted the essential components of the federal common law of foreign relations. First, it rejected the foreign relations effects test. It made clear that courts had no authority to identify these effects and weigh them against the competing legitimate interests of states. n334 Instead, the Court emphasized that it was the job of "Congress - whose voice, in this area, is the Nation's - to evaluate whether the national interest is best served by tax uniformity, or state autonomy." n335 Second, the Court made clear that the "one voice" test could not serve as a criterion for judicial federalization. n336 The Court accordingly dismissed as irrelevant the California scheme's inconsistency with "Executive Branch communications that express federal policy but lack the force of law." n337 What mattered was that no federal law validly enacted by one of the political branches had preempted the state action. n338 Third, the Court established a presumption that congressional inaction in the face of adverse state foreign relations activity in- [*1701] dicates "Congress' willingness to tolerate" the state practice. n339 These three factors, taken together, undermine much of the logic of the federal common law of foreign relations. n340

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n334. Id. at 328 (petitioners' claim of potential retaliation by trading partners "directed to the wrong forum" because "the judiciary is not vested with power to decide "how to balance a particular sovereign risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please'" (quoting Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 194 (1983))).

n335. Id. at 331.

n336. Id. at 328-31.

n337. Id. at 330.

n338. Id. at 328-30.

n339. Id. at 327; see also id. at 326 ("Congress implicitly has permitted the States to use the worldwide combined reporting method."); id. at 331 (Blackmun, J., concurring) (stating that majority opinion relies on "congressional inaction to conclude "that Congress implicitly has permitted the States to use the worldwide combined reporting method'"). The Court did not specify whether this inference is limited to cases, like Barclays Bank, in which Congress had expressly considered and rejected federalization of the state activity in question. See Eskridge, supra note 301, at 90 & n.140.

n340. See Spiro, supra note 62, at 164 (Barclays Bank represents "a highly significant retreat in a line of foreign Commerce Clause rulings articulating a "one voice' approach parallel to other forms of foreign affairs preemption"); see also Barclays Bank, 512 U.S. at 332 (Scalia, J., concurring) (majority opinion effectively eliminates the "speak with one voice" test).

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Other recent foreign relations decisions outside the federalism context mark an analogous retreat from doctrines that require courts to make foreign relations judgments. In E.E.O.C. v. Arabian American Oil Co. (Aramco), n341 the Court established a strict presumption against extraterritoriality in the absence of a plain legislative statement to the contrary. After explaining that this rule "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord," n342 the Court invited Congress to amend Title VII and "calibrate its provisions in a way that we cannot." n343 As Curtis Bradley has explained, the Court in Aramco recognized its relative incompetence to make fine-grained foreign relations judgments, and it conceived its proper role to be one of encouraging the political branches to embody such judgments in federal legislation. n344

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n341. 499 U.S. 244 (1991). Aramco is a subsidiary of the Arabian American Oil Company. See id. at 247.

n342. Id. at 248.

n343. Id. at 259 (emphasis added).

n344. See Bradley, supra note 212, at 112.

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A similar strategy was at work in the Court's most recent act of state decision. As discussed, Sabbatino made the act of state doctrine's applicability turn on a judicial assessment of the foreign relations implications of examining the validity of foreign acts of state. n345 Not surprisingly, in light of the institutional competence and structural factors discussed above, act of state juris- [*1702] prudence for a quarter century following Sabbatino was notoriously confused and inconsistent. n346 In W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., n347 the Supreme Court went a long way toward eliminating the relevance of inquiries into the foreign relations implications of decisions. At issue was whether the act of state doctrine barred the adjudication of a suit between Americans that involved bribes to Nigerian officials. Both lower courts had engaged in fine-grained inquiries into the foreign relations consequences of the adjudication. n348 But the Court rejected this standard-like approach to the doctrine's applicability. n349 It held that these inquiries are irrelevant unless the validity of a foreign act of state is in question. n350 This approach significantly narrowed the scope of judicial foreign relations inquiries in the act of state context and left it to the federal political branches to embody any concerns about these adjudiciations in a federal enactment.

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n345. See supra note 46 and accompanying text.

n346. See Joseph W. Dellapenna, Deciphering the Act of State Doctrine, 35 Vill. L. Rev. 1, 3-9 (1990).

n347. 493 U.S. 400 (1990).

n348. The district court concluded that the act of state doctrine should apply because inquiry into foreign sovereign motivation would "result in embarrassment to the sovereign or constitute interference in the conduct of foreign policy of the United States." 659 F. Supp. 1381, 1392-93 (D.N.J. 1987). The court of appeals concluded, to the contrary, that the doctrine did not apply because the inquiry into motivation would not produce "unique embarrassment...[or] particular interference with the conduct of foreign affairs." 847 F.2d 1052, 1061 (3d Cir. 1988).

n349. Environmental Tectonics, 493 U.S. at 404-06.

n350. Id. at 406.

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Taken together, Barclays Bank, Aramco, and Environmental Tectonics suggest that in nonconstitutional foreign relations cases in which the political branches' wishes are uncertain, the Court follows an interpretive strategy that both eschews foreign policy judgments by the judiciary and encourages the political branches to consider and address such concerns in enacted federal law. n351 This is precisely the strategy we would expect based [*1703] on the judiciary's relative incompetence in ascertaining the appropriate content of an uncertain federal rule that is ultimately subject to political branch expertise and control. n352 This strategy is especially appropriate in the context of the federal common law of foreign relations, for there are independent reasons to believe that Congress will intervene and remedy untoward state activity when appropriate. n353

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n351. This interpretive strategy functions much like information-forcing default rules in contract theory. See Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L.J. 87, 97 (1989); Robert E. Scott, A Relational Theory of Default Rules for Commercial Contracts, 19 J. Legal Stud. 597, 609-11 (1990). On the application of contract theory default rules to statutory interpretation, see Cass Sunstein, Justice Scalia's Democratic Formalism, 106 Yale L.J. (forthcoming 1997).

n352. See Sunstein, supra note 351.

n353. This is an important point. One problem with a judicial information-forcing strategy is that a court cannot always be confident that its information-forcing rule worked when Congress responds with silence. Consider the presumption against extraterritoriality. What if a court applies this doctrine to an ambiguous statute and Congress does not respond? Did the rule force information? Does the silence represent agreement with a court's choice of legal regimes or is it simply a product of legislative inertia and limited resources? If forcing information were a court's only objective, it should have established the opposite presumption, in favor of extraterritoriality, because it is much more likely that such a presumption would run counter to congressional wishes and induce complaints from foreign sovereigns, thus providing an informative congressional response. There are all sorts of institutional reasons why the Court does not in fact engage in such "pure"

information-forcing strategies. The point here is that we can only be confident that an information-forcing rule will work to the extent that we think it is likely to induce an informative legislative response. In this respect, the elimination of the federal common law of foreign relations is a better information-forcing rule than the presumption against extraterritoriality, for, as I explained above, there are powerful independent reasons to think that political branch silence is meaningful, and (to put the same point a different way) that the political branches will respond when the absence of federal law is the wrong rule. Cf. Bradley, supra note 212, at 166-69 (arguing that presumption against extraterritoriality may force Congress to decide extraterritorial scope of federal law).

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The Court's pursuit of a similar information-forcing strategy in the domestic federalism context provides further support for the elimination of the federal common law of foreign relations. The Court's various state-protecting plain-statement rules aim to ensure, among other things, that the political branches rather than the courts make the decision to preempt state law. n354 Along similar lines, the Court's most recent federal common law rulings have criticized the "runaway tendencies of "federal common law' untethered to a genuinely identifiable (as opposed to judi- [*1704] cially constructed) federal policy," n355 and emphasized that reliance upon such law is limited to those cases involving a "significant conflict between some federal policy or interest and the use of state law." n356 These decisions did not involve foreign relations and did not purport to affect the legitimacy of Sabbatino or Zschernig. n357 But they do reflect a narrowing of federal common law generally, and a distinct preference for political rather than judicial preemption.

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n354. See, e.g., Blatchford v. Native Village of Noatak, 501 U.S. 775, 786-88 (1991); Gregory v. Ashcroft, 501 U.S. 452, 460-64 (1991); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238-40 (1985); see also William N. Eskridge, Jr. & Philip P. Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking, 45 Vand. L. Rev. 593, 596-98 (1992) (analyzing the Court's application of clear statement rules during the 1970s and 1980s).

n355. O'Melveny & Myers v. F.D.I.C., 512 U.S. 79, 89 (1994).

n356. Atherton v. F.D.I.C., 117 S. Ct. 666, 670 (1997) (quoting Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966)).

n357. See id. at 673-74 (distinguishing the claimed federal interest as "far weaker than was present in," among other cases, Sabbatino).

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Finally, it is worth emphasizing how little Supreme Court jurisprudence (as opposed to lower court precedent and academic commentary) depends on the existence of a federal common law of foreign relations. n358 The Court has already severely restricted the content of its two recognized federal common law of foreign relations doctrines - the act of state doctrine and the one-voice component of the dormant foreign Commerce Clause. n359 The three act of state decisions since Sabbatino declined to apply the doctrine. n360 These decisions

have created numerous restrictions [*1705] and exceptions that effectively limit the doctrine to the facts of Sabbatino. n361 The validity limitation announced in Environmental Tectonics, in particular, seems to have significantly curtailed the act of state doctrine's relevance. As for the one-voice test in dormant foreign Commerce Clause cases: Barclays Bank effectively eliminated it. n362

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n358. Perhaps the most cited decision in support of the federal common law of foreign relations is Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981), which stated that the federal common law includes areas "concerned with... international disputes implicating...our relations with foreign nations." This statement, however, was dictum. The Court held only that there was no federal common law right of contribution from antitrust co-conspirators. Id. at 643-44. The decision had nothing to do with foreign relations.

n359. The Court never directly applied the dormant foreign relations preemption doctrine announced in Zschernig. Soon after Zschernig, however, the Court dismissed factually similar cases for lack of a substantial federal question. See Maier, supra note 97, at 141-43 & n.43 (citing Gorun v. Fall, 393 U.S. 398 (1968), and Ioannou v. New York, 391 U.S. 604 (1968) (per curiam)).

n360. See W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400, 409-10 (1990) (concluding that validity of foreign act of state not in question); Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 689-95 (1976) (finding nothing in record that reveals an official act of state); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 764-70 (1972) (three-Justice plurality) (concluding that doctrine does not apply when executive branch advises against its application); id. at 770-73 (Douglas, J., concurring) (sovereign waived act of state doctrine by filing suit); id. at 773-76 (Powell, J., concurring) (potential for conflict between political and judicial branches not sufficient to apply act of state doctrine).

n361. See Dellapenna, supra note 318, at 294-319 (discussing limitations on and exceptions to the act of state doctrine).

n362. See supra note 336 and accompanying text. In addition, as mentioned above, the Court has stated that the immigration power is exclusively federal, but it does not appear that a constitutionally based exclusive power adds anything to the federal political branches' comprehensive occupation of the field. See supra note 159.

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B.

Objections

My argument for the elimination of the federal common law of foreign relations is subject to at least two important types of objection. The first is that it ignores intermediate solutions between the extremes of the current practice and its elimination. The second is that it ignores problems of interpretive indeterminacy.

1.

Intermediate Solutions

To this point I have analyzed the validity of judge-made foreign relations law on the assumption that the alternatives were to retain the practice in its current form or eliminate it. This assumption was made for analytic purposes to highlight the logic and consequences of the modern practice. But there are a number of intermediate solutions between the extremes of the modern practice and its elimination. One might object that one or some of these intermediate solutions are preferable to the elimination of judge-made foreign relations law.

a.

A Narrower, More Categorical Approach

One intermediate solution would be for courts to replace the open-ended and relatively indeterminate effects standard for judge-made foreign relations law with narrower, more categorical foreign relations lawmaking criteria. For example, Professor Arthur Weisburd, who is generally critical of the federal common law of foreign relations, suggests that application of the doctrine [*1706] be limited to three circumstances: (a) "any matter that requires a prior decision about what counts as a foreign state"; (b) "matters where a foreign state's public policy will be subject to formal judicial evaluation"; and (c) "immigration matters." n363 Professor Henkin suggests a different list: "the determination of customary international law and comity for judicial purposes; guidelines for the interpretation of treaties and the meaning of particular treaty provisions; the principles of (international) conflicts of laws; rules as to access of foreign governments to domestic courts and the treatment of foreign judgments." n364

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n363. Weisburd, supra note 62, at 59.

n364. Henkin, supra note 1, at 139 (citation omitted). Professor Henkin, unlike Professor Weisburd, supra note 62, at 59, does not purport to make his list exclusive.

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A narrower categorical approach would reduce the decision costs and perhaps some of the error costs that inhere in the current practice. But as the disagreements between Professors Weisburd and Henkin indicate, the fundamental problem of deciding which narrowly defined categories warrant judicial preemption would remain. The task would be for courts to determine which judicially identifiable categories of preemption best serve the doctrine's underlying purposes. This task would be subject to all of Section III's criticisms - the uncertain need for such law, courts' relative incompetence to choose the appropriate category of preemption and the content of this law, asymmetry in political branch incentives to revise judicial errors, and so on.

The most plausible categories for self-executing and exclusive federal foreign relations powers are found in Article I, Section 10 of the Constitution: international agreements, the regulation of war, and the taxation of imports and exports. n365 As explained above, n366 the best functional justification for these prohibitions on state power is that concurrent state power in these areas is especially likely to harm the federal foreign relations process, and the clarity of the prohibitions attenuates the need for judicial enforcement and minimizes errors when judicial enforcement is necessary. These considerations suggest that any rule-based approach to the federal common law of foreign relations should [*1707] track the categorical form and traditional foreign relations content of Article I, Section 10.

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n365. See Spiro, supra note 62, at 170 n.190.

n366. See supra Section III.A.

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This conclusion is less significant than it might at first appear, for a federal common law of foreign relations so conceived would have very little practical scope. This is so because the closer a state act gets to impinging on a traditional foreign relations prerogative of the federal government, the more likely it is that this act is either barred by Article I, Section 10 or a federal political branch enactment, or that the federal political branches will intervene to protect these prerogatives. Consider the sending and receiving of ambassadors. The problem is this: Although Article VI of the Articles of Confederation prohibited states from "sending any embassy to, or receiving any embassy from," foreign states, n367 Article I, Section 10 does not mention this prohibition. And yet for some, it seems inconceivable that this quintessentially international activity should be anything other than an exclusive prerogative of the federal government. n368

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n367. U.S. Articles of Confederation art. VI.

n368. See Clark, supra note 62, at 1297-98; see also Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 575 (1840) (Taney, J.).

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As an initial matter, it is far from inconceivable that states retain some authority to "send and receive ambassadors." Foreign trade and economic development missions are standard activities for U.S. governors. So too is the receiving and entertaining of foreign sovereign representatives. However, as states begin to send and receive ambassadors in a fashion that impinges on traditional diplomatic prerogatives, enacted federal law becomes implicated. Although Article I, Section 10 is silent on this point, its express prohibition against states entering into treaties or making compacts or waging war attenuates the possibility that states will send and receive ambassadors in a manner that interferes with federal diplomatic prerogatives. The complex web of treaties, statutes, and regulations that govern U.S. diplomatic relations provides further protection for federal prerogatives in this context. n369 Any

remaining doubt about the adequacy of le- [*1708] gal protection for federal interests in this context is dissipated by the Logan Act, which prohibits citizens from communicating with foreign governments "with intent to influence [their] measures or conduct...in relation to any disputes or controversies with the United States." n370 And even if these provisions did not prohibit a state's attempt to send or receive an ambassador in a way that disrupted federal prerogatives, there is no reason to think that the political branches are less than fully capable of acting quickly to do so. n371

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n369. See, e.g., Diplomatic Relations Act, 22 U.S.C. 254a-254e (1994); Foreign Sovereign Immunities Act, 28 U.S.C. 1602-11 (1994); Vienna Convention on Consular Relations, Apr. 23, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261; Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

n370. 18 U.S.C. 953 (1994). The Logan Act was enacted in 1798. For its background and history, see Detlev F. Vagts, The Logan Act: Paper Tiger or Sleeping Giant?, 60 Am. J. Int'l L. 268, 269-80 (1966); Kevin M. Kearney, Note, Private Citizens in Foreign Affairs: A Constitutional Analysis, 36 Emory L.J. 285, 287-306 (1987).

n371. Cf. National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 522, 100 Stat. 3816, 3871 (Congress's response to state governors' exploitation of the gap in federal authority to call up National Guard troops).

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For these reasons, it seems unlikely that a rule-based approach to the federal common law of foreign relations limited to traditional foreign relations activities would differ much from my proposed elimination of the doctrine. And as the scope of the doctrine expands to include nontraditional state foreign relations activities that require more fine-grained contextual assessments, a rule-based approach will be much harder to craft, and error costs of any such rule will likely be significant.

b.

Executive Suggestion

Another intermediate solution is that courts should make federal foreign relations law only when the executive branch officially suggests - in the form of a brief or other communication to a court - that the foreign relations interests of the United States require such law. The executive's statement would constitute case-specific federal law binding on courts. In the twentieth century, such an "executive suggestion" has been employed in a number of discrete contexts. n372 Most prominently, it was used to determine a foreign sovereign's immunity from suit during the [*1709] thirty-year period prior to the enactment of the FSIA in 1976. n373 It has also been deemed binding on courts for issues such as the recognition of nations and governments and the existence of a state of war or neutrality. n374

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n372. The executive suggestion is largely a 20th-century development. See John Norton Moore, The Role of the State Department in Judicial Proceedings, 31 Fordham L. Rev. 277, 284 & n.41 (1962).

n373. See Ex Parte Peru, 318 U.S. 578, 588-89 (1943); see generally Andreas F. Lowenfeld, Claims against Foreign States - A Proposal for Reform of United States Law, 44 N.Y.U. L. Rev. 901 (1969).

n374. See Moore, supra note 372, at 278-79 (collecting sources).

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At first glance, the executive suggestion appears to solve many of the problems associated with judge-made foreign law, because the executive has the expertise, the democratic accountability, and the centralized decisionmaking capabilities that federal courts lack. But outside of very discrete contexts identified to be the exclusive prerogative of the President, the executive suggestion has been strongly criticized by commentators n375 and resisted by courts. n376 While it does not suffer from many of the problems associated with the federal common law of foreign relations, the executive suggestion does suffer from other debilitating flaws.

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n375. See, e.g., Philip C. Jessup, The Use of International Law 77-86 (1959); Moore, supra note 372, at 296-302; Thomas M. Franck, The Courts, The State Department and National Policy: A Criterion for Judicial Abdication, 44 Minn. L. Rev. 1101, 1102-04 (1960).

n376. In First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972), a majority of Justices rejected the view that the executive could determine through an executive suggestion whether courts should or should not apply the act of state doctrine. Id. at 773 (Powell, J., concurring); id. at 782-85 (Brennan, J., dissenting). And the Court in both Sabbatino and Zschernig went out of its way to avoid tying the federal common law of foreign relations to executive branch representations. See supra note 41 and accompanying text.

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Most significantly, in contrast to the delegated executive lawmaking powers discussed above, the executive suggestion has no legal basis. Congress has not generally authorized executive lawmaking power of this sort. Article II cannot plausibly support this power, and Article III is viewed by many to prohibit it. n377 In addition, case-specific federal lawmaking without notice, opportunity to be heard, or appellate review does violence to basic notions of due process. n378 And the existence of a power to [*1710] make case-specific federal law would likely impose unwanted burdens on the executive branch. n379 The executive's pre-FSIA control over foreign sovereign immunity determinations provides a nice example. Such control was generally viewed to be more hurtful that helpful to the foreign relations process because it politicized the immunity determinations and made a denial of immunity seem more offensive to foreign sovereigns than did a similar ruling by a judge. n380 For this reason, the executive branch strongly supported the statutory codification of foreign

sovereign immunity in 1976. n381

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n377. See, e.g., Philip C. Jessup, Has the Supreme Court Abdicated One of Its Functions?, 40 Am. J. Int'l L. 168, 170-71 (1946).

n378. The State Department's pre-FSIA practice was to give foreign states an informal hearing on the question of immunity. See Lowenfeld, supra note 373, at 912-13. But the State Department lacked most of the procedural accouterments needed for a fair adjudication, including adequate factfinding resources, appellate review, or written opinions. See id. at 912 & n.33.

n379. See Jessup, supra note 375, at 85; Note, Judicial Deference to the State Department on International Legal Issues, 97 U. Pa. L. Rev. 79, 91-92 (1948).

n380. See Jessup, supra note 375, at 85; Lowenfeld, supra note 373, at 913; Moore, supra note 372, at 299. See also Foreign Sovereign Immunities Act of 1976, H.R. Rep. No. 94-1487, at 7 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6606 (one purpose of enacting FSIA was to free the State Department "from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity").

n381. See Foreign Sovereign Immunities Act of 1976, H.R. Rep. No. 94-1487, at 9 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6608.

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Perhaps because of these problems, no one has seriously proposed that the executive suggestion replace the federal common law of foreign relations. But this analysis does raise the question: Why not solve any difficulties presented by state foreign relations activities by having the State Department promulgate administrative rules to regulate such activities? This would solve the legitimacy and institutional competence concerns of the federal common law of foreign relations as well as the legitimacy and due process concerns of the executive suggestion. n382 A full analysis of this position is not my task, for I have argued that the federal political branches currently require no supplemental assistance. But those who think they do must explain why courts rather than agencies should supply this assistance. n383

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n382. Cf. Dan M. Kahan, Is Chevron Relevant to Federal Criminal Law?, 110 Harv. L. Rev. 469 (1996) (making similar point in context of federal criminal law).

n383. Cf. Eule, supra note 258, at 435-37 (making similar point in context of dormant Commerce Clause).

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c.

Motive Review

A third intermediate solution is judicial review of state activity based on impermissible purpose or motive to conduct foreign relations. This approach finds passing support in Zschernig n384 and some lower court decisions. n385 It would avoid many of the evils of a foreign relations effects test. In a world in which most state activity can affect foreign affairs, it would likely do a better job than the effects test of preventing states from competing with the federal government for control of foreign relations. It would also be easier for courts to administer than an open-ended effects test. As many have pointed out, courts are much better at smoking out impermissible purpose than they are at identifying, weighing, and accommodating the effects of government action. n386 A motive test would also narrow the federal common law of foreign relations' scope of preemption significantly, for most state laws potentially subject to preemption - for example, most private international law rules and the manner in which a state treats its citizens - are facially neutral and were not designed with the purpose of influencing U.S. foreign relations. By contrast, a motive test would likely prohibit state foreign relations activities such as nuclear freeze ordinances and political sanctions that, for many, present the strongest case for the federal common law of foreign relations.

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n384. 389 U.S. at 433-34 & n.5.

n385. See, e.g., Springfield Rare Coin Galleries, Inc. v. Johnson, 503 N.E.2d 300, 305 (Ill. 1986); see also Maier, supra note 97, at 155-59.

n386. See, e.g., John Hart Ely, Democracy and Distrust 136-40 (1980); Ashutosh Bhagwat, Purpose Scrutiny in Constitutional Analysis, 85 Cal. L. Rev. 297, 321-23 (1997); Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 505-14 (1996); Regan, supra note 254, at 1143-60.

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I have argued that the federal political branches do not require judicial assistance in preventing states from intruding on federal prerogatives in foreign relations. But if I am wrong about this, then for the reasons just stated motive analysis seems the best way for courts to proceed in regulating state foreign relations activity. The primary problem that courts would face in this regard would be the definition and identification of the impermissible foreign relations ends. [*1712]

2.

Indeterminacy of Interpretation

One might object to my definition of judge-made foreign relations law as

foreign relations law made by courts in the absence of political branch authorization. Most statutory interpretation can be construed as a form of delegated or interpretive federal common lawmaking. There is no generally accepted way to know when legitimate statutory interpretation ends and groundless judicial lawmaking begins. Indeed, in our post-realist world, the distinction makes little sense, at least in very large gray areas of statutory interpretation. This standard problem raises the question: How do courts distinguish between, on the one hand, permissible federal common law authorized by the Constitution, statute, or treaty, and on the other, impermissible federal common law that lacks any basis in enacted federal law? Others have addressed this problem in detail. n387 My modest aim here is to suggest how my thesis that judicial preemption of state foreign relations activities must be grounded in a federal enactment relates to these standard interpretive difficulties.

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n387. See Eskridge, Dynamic Interpretation, supra note 304, at 48-80; Merrill, supra note 21, at 328-32; Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 411-13 (1989).

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First, every area of federal common law discussed in this Article lacks plausible authorization in a federal enactment. n388 As a result, the insistence that courts focus on political branch enactments rather than on their own assessments of the foreign relations consequences of an adjudication will significantly limit the scope of the doctrine. Thus, for example, the FSIA's requirement that otherwise applicable state law governs legal disputes involving foreign sovereigns makes it difficult to conclude (as many courts have done) that a federal common law of foreign relations should govern certain tort, property, and contract issues in alien diversity suits against non-sovereigns. n389 Similarly, the political branches have consistently attached reservations, understandings, and declarations to their ratifications of international human rights treaties to ensure that the norms of these treaties do not apply as domestic federal law that trumps state [*1713] law. n390 In this light, the near-unanimous academic view that customary international human rights law applies as an element of the federal common law of foreign relations to trump state law has little justification. n391 For these customary international human rights norms are based almost exclusively on the very treaties that the political branches have taken pains to exclude from the domain of federal law. n392

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n388. This explains why courts that have developed the federal common law of foreign relations have not relied on enacted federal law.

n389. See my criticism of Torres supra note 319 and accompanying text.

n390. See supra note 235 and accompanying text.

n391. See Bradley & Goldsmith, supra note 101, at 869-70.

n392. See id.

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Second, in the few plausible cases in which there is genuine uncertainty about whether enacted law supports a federal common law of foreign relations rule, my thesis does not speak to the debate about statutory interpretation or the appropriate level of authorization for federal common law. It insists only that the interpretive analysis not be informed by a notion of dormant foreign relations preemption, or by the federal courts' independent view of the foreign relations consequences of applying state law.

## Conclusion

In this Article, I have made historical and normative claims. On the historical side, I have argued that the federal common law of foreign relations does not, as many suppose, have a long pedigree. The doctrine appeared on the scene for the first time in 1964. And the doctrine has found much less support in subsequent Supreme Court jurisprudence than is commonly thought. The Court applied the doctrine in only a few instances after 1964, and in recent years it has significantly undercut the force of these precedents. In sum, the federal common law of foreign relations had a late birth and an uncertain life in Supreme Court jurisprudence.

On the normative side, I have argued that the federal common law of foreign relations lacks justification. The most frequently cited normative bases for the doctrine - original intent and longstanding historical practice - are belied by my historical analysis. The functional case for the doctrine is more powerful. This case is strongest when states impinge on traditional federal [*1714] foreign relations prerogatives like war-making and treaty-making. But in these and related traditional foreign relations contexts, federal exclusivity is effectively assured by Article I, Section 10 and by extant federal enactments. The federal common law of foreign relations is thus relevant, if at all, only to nontraditional foreign relations matters such as state common law and procedural rules as applied in the transnational context, newer forms of state transnational economic and political activity, and purely domestic state acts that implicate the new customary international law of human rights. These new foreign relations issues are much more closely tied to traditional state prerogatives than traditional foreign relations issues, and decentralization of these matters often serves salutary ends. This complicates the trade-off between the national foreign relations interests and state interests, and raises the question whether federal courts are the appropriate branch of the federal government to resolve the contest in the first instance. I have argued that this question should be answered in the negative because the federal political branches are well-suited to identify and redress genuine state threats to the national foreign relations interest, and because the error and decision costs of a supplemental federal judicial lawmaking power are high.

There is a more general lesson here. Like the federal common law of foreign relations, other jurisdictional aspects of American foreign relations law implicitly depend on a discrete and manageable distinction between foreign and domestic affairs. For example, the political question doctrine in the foreign affairs context sometimes requires courts to abstain from reviewing a political branch action because the conduct of foreign relations is a political branch prerogative or because an adjudication would cause adverse foreign relations

consequences. n393 Similarly, constitutional limitations on federal power are less rigorous when the federal government acts in foreign relations [*1715] contexts. n394 As the line between domestic and foreign relations blurs, the continued viability of these and related doctrines as currently understood is uncertain. An important challenge for U.S. foreign relations law is to rethink how its jurisdictional doctrines apply in a world in which "foreign relations" is no longer a distinctive category.

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n393. See Goldwater v. Carter, 444 U.S. 996 (1979); Baker v. Carr, 369 U.S. 186 (1962). See generally Thomas M. Franck, Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs? (1992) (analyzing and critiquing widespread but inconsistent use of political question doctrine in foreign relations cases).

n394. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Missouri v. Holland, 252 U.S. 416 (1920); see generally Henkin, supra note 221 (arguing that there are no enumerated power limits on the federal government's power to make foreign relations law).

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LEVEL 1 - 83 OF 96 ITEMS


Virginia Law Review

May, 1995

81 Va. L. Rev. 947

LENGTH: 91673 words

ARTICLE: ORIGINALISM AND THE DESEGREGATION DECISIONS

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SUMMARY:
... Shortly after the decision, in what remains the leading article on the issue, Professor Alexander Bickel surveyed the events leading up to the ratification of the Fourteenth Amendment and stated that the "obvious conclusion," to which the legislative history "easily leads," is that the Amendment "as originally understood, was meant to apply neither to jury service, nor suffrage, nor anti-miscegenation statutes, nor segregation." ... The Civil Rights Act of 1866 was evidently never intended by its sponsors to speak to the issue of school segregation, but the debate over its phrasing has considerable bearing. ... The language of the bill forbade "distinction of race, color, or previous condition of servitude" and guaranteed "the equal and impartial enjoyment of any accommodation, advantage, facility, or privilege" furnished by the covered institutions. ... The debates in May 1872 presented senators with the opportunity to vote on proposals embodying both of the constitutional theories of the opposition - that education is not a civil right and is therefore not protected by the Amendment, and that segregation does not offend the principle of equality. ... This is what we know: (1) on ten recorded votes in the Senate and eight recorded votes in the House between 1871 and 1875, a majority (but always less than two-thirds) voted for legislation premised on the unconstitutionality of school segregation; (2) efforts to approve separate-but-equal requirements for education were invariably defeated; and (3) there was a high correlation between votes on the Fourteenth Amendment and votes in favor of school desegregation. ...

TEXT:
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Introduction

CHIEF Justice Earl Warren's unanimous opinion for the Supreme Court in Brown v. Board of Education n1 made no pretense that its interpretation was an authentic translation of what the Fourteenth Amendment meant to those who drafted and ratified it. The Court described the historical sources as "at best, ... inconclusive." n2 This "at best" carries the strong implication that in the cold, hard eye of objective historical examination, the sources point the other way. Stating that "we cannot turn the clock back to 1868 when the Amendment was adopted," n3 the Court based its decision primarily on the "modern authority" of social science. n4 Brown was arguably the first explicit, self-conscious departure from the traditional view that the Court may override democratic decisions only on the basis of the Constitution's text, history, and interpretive tradition - not on considerations of modern social policy. n5

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n1. 347 U.S. 483 (1954).

n2. Id. at 489.

n3. Id. at 492.

n4. Id. at 494.

n5. As recently as 1939, Jacobus tenBroek, probably the leading constitutional scholar of the Fourteenth Amendment at that time, could write:

Whenever the United States Supreme Court has felt itself called upon to announce a theory for its conduct in the matter of constitutional interpretation, it has insisted, with almost uninterrupted regularity, that the end and object of constitutional construction is the discovery of the intention of those persons who formulated the instrument or of the persons who adopted it.

Jacobus tenBroek, Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction, 27 Cal. L. Rev. 399 (1939). Another candidate for the first departure - but of less importance than Brown - is Home Bldg. Ass'n v. Blaisdell, 290 U.S. 398 (1934).

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In the forty years since Brown, legal scholars generally have concluded that the Court did not rely on the historical understanding because it could not. Shortly after the decision, in what remains the leading article on the issue, Professor Alexander Bickel surveyed the events leading up to the ratification of the Fourteenth Amendment and stated that the "obvious conclusion," to which the legislative history "easily leads," is that the Amendment "as originally understood, was meant to apply neither to jury service, nor suffrage, nor anti-miscegenation statutes, nor segregation." n6 A decade later, constitutional historian Alfred Avins wrote an article pointing out that efforts by members of the Reconstruction Congresses to prohibit school desegregation in the 1875 bill to enforce the Fourteenth Amendment were defeated. n7 He described as "inevitable" the conclusion that the Brown decision was "an unwarranted exercise of "non-existent authority ... illegitimate in its origin...." n8 With

remarkably few exceptions, n9 later scholarship has continued to accept this historical assessment (though not nec [*951] essarily the jurisprudential conclusion). In a recent article, for example, Professor Michael Klarman states that:

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n6. Alexander M. Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1, 58 (1955). Bickel's article was based on research he had done as law clerk for Justice Frankfurter during the course of deliberations over Brown.

n7. Alfred Avins, De Facto and De Jure School Segregation: Some Reflected Light On the Fourteenth Amendment From the Civil Rights Act of 1875, 38 Miss. L.J. 179 (1967).

n8. Id. at 246.

n9. The only unequivocal statements I have found in the academic literature since Brown arguing that the decision was correct on originalist principles are in Michael Perry, The Constitution in the Courts, 145-46 (1994) and John Harrison, Reconstructing the Privileges or Immunities Clause, 101 Yale L.J. 1385, 1462-63 (1992). These scholars deal with the segregation issue, however, in a few short paragraphs with little historical detail. See also Note, Is Segregation Consistent with Equal Protection of the Laws? Plessy v. Ferguson Reexamined, 49 Colum. L. Rev. 629, 631-33 (1949) (pre-Brown Note presenting brief summary of the evidence that segregation was understood to be unconstitutional). More equivocal, but still an exception, is John P. Frank & Robert F. Munro, The Original Understanding of "Equal Protection of the Laws," 1972 Wash. U. L.Q. 421, 456-67. "We conclude that it was accepted virtually unanimously by all who supported the fourteenth amendment that it required equal schools and that a very large number of its supporters thought that the amendment forbade segregated schools." Id. at 467. An earlier version of this article was published under the same title at 50 Colum. L. Rev. 131 (1950). In addition, two leading historians of the period have treated the evidence as inconclusive. See Charles A. Lofgren, The Plessy Case 65 (1987) ("The evidence points both ways."); William E. Nelson, The Fourteenth Amendment 134-35 (1988) (there is "evidence that at least some members of Congress and the state legislatures may have appreciated the capacity of the Fourteenth Amendment to promote desegregation[,]" but "Congress never institutionalized this judgment in its debates on the Fourteenth Amendment").

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When Chief Justice Warren declared in Brown that evidence of the framers' views on school segregation was "inconclusive," he was being considerably less than candid. Evidence regarding the original understanding of the Fourteenth Amendment is ambiguous as to a wide variety of issues, but not school segregation. Virtually nothing in the congressional debates suggests that the Fourteenth Amendment was intended to prohibit school segregation, while contemporaneous state practices render such an interpretation fanciful; twenty-four of the thirty-seven states then in the union either required or permitted racially segregated schools. n10

In a similar vein, Robert Bork states that "the inescapable fact is that those who ratified the amendment did not think it outlawed segregated education or segregation in any aspect of life." n11 From the other side of the ideological spectrum, Mark Tushnet agrees: "Suppose that we [turned] back the clock so that we could talk to the framers of the fourteenth amendment. If we asked them whether the amendment outlawed segregation in public schools, they would answer "No.' " n12

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n10. Michael Klarman, An Interpretive History of Modern Equal Protection, 90 Mich. L. Rev. 213, 252 (1991) (citations omitted).

n11. Robert H. Bork, The Tempting of America 75-76 (1990). Bork nonetheless defends the result, though not the opinion, in Brown on the ground that - as "had been demonstrated in a long series of cases" - "segregation rarely if ever produced equality." Id. at 82. Bork argues that holding segregation unconstitutional was necessary to bring to a halt the "endless litigation" over the quality of segregated facilities, which would impose a "burden on the courts" and "never produce the equality the Constitution promised." Id. To my mind, this argument is more typical of the constitutional methodology Bork criticizes than it is of his own professed originalist methodology. If segregation is not unconstitutional, how can the burden of litigation on the courts justify striking it down? For critiques of Bork's position, see Richard A. Posner, Bork and Beethoven, 42 Stan. L. Rev. 1365, 1375-76 (1990); Raoul Berger, Robert Bork's Contribution To Original Intention, 84 Nw. U. L. Rev. 1167, 1176-83 (1990) (reviewing Robert Bork, The Tempting of America (1990)); David A.J. Richards, Originalism Without Foundations, 65 N.Y.U. L. Rev. 1373, 1379-82 (1990) (reviewing Bork).

n12. Mark V. Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 Harv. L. Rev. 781, 800 (1983).

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These expressions of scholarly judgment are strong and unequivocal. The evidence is "obvious" and "unambiguous," the conclusion is "inevitable" and "inescapable," and "virtually nothing" supports the opposite claim, which is said to be "fanciful." This is [*952] one point on which Raoul Berger, Ronald Dworkin, Richard Kluger, Earl Maltz, Bernard Schwartz, Laurence Tribe, Thomas Grey, Donald Lively, Richard Posner, and David Richards - not to mention Bickel, Avins, Klarman, Bork, Tushnet, and countless others - can agree. n13 In the fractured discipline of constitutional law, there is something very close to a consensus that Brown was inconsistent with the original understanding of the Fourteenth Amendment, except perhaps at an extremely high and indeterminate level of abstraction. n14 According to one recent survey of the literature, "the "original understanding' on the issue of school segregation is not genuinely in doubt." n15

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n13. Raoul Berger, Government By Judiciary 117-33, 241-45 (1977); Ronald Dworkin, Law's Empire 360-61, 366 (1986); Richard Kluger, Simple Justice 634 (1975); Earl M. Maltz, Civil Rights, the Constitution and Congress, 1863-1869,

at 113 (1990); 1 Bernard Schwartz, Statutory History of the United States 660 (1970); Laurence H. Tribe & Michael C. Dorf, On Reading the Constitution 12-13 (1991); Thomas C. Grey, Do We Have An Unwritten Constitution?, 27 Stan. L. Rev. 703, 712 (1975); Donald E. Lively, Constitutional Turf Wars: Competing for the Consent of the Governed, 42 Hastings L.J. 1527, 1538 (1991); Posner, supra note 11, at 1374; David A.J. Richards, Abolitionist Political and Constitutional Theory and the Reconstruction Amendments, 25 Loy. L.A. L. Rev. 1187, 1188 (1992); Mark Tushnet, What Really Happened in Brown v. Board of Education, 91 Colum. L. Rev. 1867, 1919 (1991).

n14. The historicity of Brown is often defended by invoking abstract ideas of "equality" at odds with those of the Framers. See, e.g., Bickel, supra note 6, at 61-65; Walter E. Dellinger, III, School Segregation and Professor Avins' History: A Defense of Brown v. Board of Education, 38 Miss. L.J. 248 (1967); Alfred H. Kelly, The Fourteenth Amendment Reconsidered: The Segregation Question, 54 Mich. L. Rev. 1049 (1956); cf. Robert J. Lipkin, Beyond Skepticism, Foundationalism and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory, 75 Cornell L. Rev. 811, 829 n.67 (1990) (discussing why abstract values, as opposed to concrete intentions, are a problematic basis for originalism).

n15. Andrew Kull, The Color-Blind Constitution 258 n.26 (1992).

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The supposed inconsistency between Brown and the original meaning of the Fourteenth Amendment has assumed enormous importance in modern debate over constitutional theory. Such is the moral authority of Brown that if any particular theory does not produce the conclusion that Brown was correctly decided, the theory is seriously discredited. n16 Thus, what once was seen as a weak [*953] ness in the Supreme Court's decision in Brown is now a mighty weapon against the proposition that the Constitution should be interpreted as it was understood by the people who framed and ratified it.

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n16. Professor Mark Tushnet has written: "For a generation, one criterion for an acceptable constitutional theory has been whether that theory explains why [Brown] was correct." Mark V. Tushnet, Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses, 27 Wm. & Mary L. Rev. 997, 999 n.4 (1986); accord Bork, supra note 11, at 77; Lawrence Lessig, Fidelity in Translation, 71 Tex. L. Rev. 1165, 1242-43 (1993); Posner, supra note 11, at 1374; Stephen L. Carter, Bork Redux, or How the Tempting of America Led the People to Rise and Battle for Justice, 69 Tex. L. Rev. 759, 777-78 (1991) (reviewing Robert Bork, The Tempting of America (1990)).

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The thesis of this Article is that the consensus is wrong. I will show in Part I that the evidence purportedly supporting the scholarly consensus is far from conclusive. Parts II and III then demonstrate that the belief that school segregation n17 does in fact violate the Fourteenth Amendment was held during the years immediately following ratification by a substantial majority of political leaders who had supported the Amendment. In a large number of votes over a three and one half year period, between one-half and two-thirds of both

houses of Congress voted in favor of school desegregation and against the principle of separate but equal. These deliberations, which were conducted in explicitly constitutional terms by Congresses charged with enforcing the new Amendment in the years immediately following its enactment, constitute the best available evidence of its meaning. Part II presents the constitutional and other arguments of both proponents and opponents of the Civil Rights Act of 1875, and Part III recounts the tortuous history of the bill, including each of the many votes on the bill and on important amendments.

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n17. By "segregation," I mean the exclusion of a child from a particular school on the basis of race, or de jure segregation. There was widespread expectation and approval of the proposition that both blacks and whites would freely choose to attend schools of their own race, and thus that actual "race mixing" would be rare. See infra text accompanying notes 626-32.

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The analysis of the constitutional arguments in Part II will reveal that there are two, and only two, plausible interpretations of the Fourteenth Amendment under which school segregation would be lawful. The first is that segregation is not a form of inequality prohibited by the Amendment. Because neither whites nor blacks would be permitted to commingle, segregation could be said to subject whites and blacks alike to the same rule of law. The second is that the Fourteenth Amendment did not command equality with regard to everything, but only with regard to "civil rights" or (to use the Fourteenth Amendment's own language) "privileges or [*954] immunities of citizens of the United States," and that education was not among these protected rights. Education was, rather, a "social right," or maybe no right at all - a mere benefit that could be withheld at the government's discretion. For the Court to have decided Brown in favor of the school defendants on originalist principles, it would have had to conclude that the original understanding of the Amendment embraced one or both of these ideas. Part III will show that neither of these propositions commanded majority support among the framers and ratifiers of the Fourteenth Amendment. Properly understood, the authoritative actions of the Reconstruction Congress in passing the Civil Rights Act of 1875 contradicted both.

For these purposes there is no need to plumb the inner feelings, motivations, or private opinions of the participants in the controversy over the 1875 Act - to separate sincerity from hypocrisy, political calculation from principle, or ambivalence from conviction. Other studies of the period have emphasized the sociological and political context. Constitutional interpretation by its nature depends on public statements and public acts. An argument made on the floor of Congress, even if insincere, tells us something about the speaker's judgment of his audience: what arguments the speaker thought were likely to persuade. I do not doubt that many of the proponents of strong civil rights measures in Congress entertained misgivings in private and had mixed motives for their actions. n18 But what matters is their public position on what the Constitution means. This is a study of the legal thinking of the antagonists in the debate, and for this purpose it is necessary to take their arguments seriously on their own terms.

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n18. See William Gillette, Retreat From Reconstruction 1869-1879, at 202-08, 214-20, 260-66, 271 (1979).

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Finally, in Part IV, I will discuss the Supreme Court's major segregation decisions in light of the original understanding. I will show that the Court's first desegregation case, Railroad Company v. Brown, n19 decided in 1873, powerfully supports the position that segregation was understood at the time to violate the principle of equality; that Plessy v. Ferguson, n20 far from being an accurate reflection of the original understanding, adopted a position more [*955] extreme than even most opponents of civil rights could maintain in the early 1870s; and that Brown v. Board of Education, decided in 1954, while correctly answering the question presented, adopted a nonhistorical interpretive methodology that seriously weakened the decision. An originalist approach in Brown would have paved the way for a more powerful judicial assault on the Jim Crow laws of the South.

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n19. 84 U.S. (17 Wall.) 445 (1873).

n20. 163 U.S. 537 (1896).

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It should be obvious that the historical issue raised here is more important for its implications for constitutional interpretive methodology than for the legitimacy of Brown, which is utterly secure. But I believe it casts light on the meaning of the Fourteenth Amendment, as well. To understand how Congress went about enforcing the Fourteenth Amendment is to gain insight into many doctrinal issues of importance today, including state action; the extent of congressional enforcement authority; the relevance of intent and effect; the meaning of "equality" as a matter of formally equal treatment or of racial subordination; the relation between due process, equal protection, and privileges and immunities; and many more. Although my focus here is on the question of school segregation, I will comment briefly on other constitutional issues as they arise.

## I. The Standard Account Reconsidered

The argument that Brown was inconsistent with the historical understanding of the Fourteenth Amendment is primarily based on three types of evidence. First, the legislative history of the Fourteenth Amendment, including the related history of the Civil Rights Act of 1866, contains almost no evidence that the framers and ratifiers expected the Amendment to affect school segregation and one clear statement by a prominent supporter that it would not. Moreover, although this legislative history contains little direct reference to the issue of school desegregation, its treatment of such collateral issues as voting rights, jury service, and miscegenation suggests that the Amendment was

not understood to have the sweeping consequences that advocates of school desegregation typically attribute to it. This was the burden of Bickel's famous article. Second, the practice of school segregation was widespread in both Southern and Northern states, as well as the District of Columbia, at the time of the proposal and ratification of the [*956] Amendment, and almost certainly enjoyed the support of a majority of the population even at the height of Reconstruction. n21 This makes it doubtful that the Congress would have proposed, or that the people of the various states would have ratified, an Amendment understood to outlaw so deeply engrained an institutional practice. Indeed, even in the North most state supreme courts in which the issue was raised concluded that school segregation did not violate the Fourteenth Amendment, and Congress actually maintained segregated schools in the District of Columbia throughout Reconstruction. This is the evidence that Klarman and others have found so compelling. Third, the Reconstruction Congress considered, debated, and ultimately rejected measures to prohibit school segregation under its power to enforce the Fourteenth Amendment. This was the evidence from which Avins concluded that the Brown decision was unwarranted.

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n21. See Eric Foner, Reconstruction: America's Unfinished Revolution 1863-1877, at 367 (1988) ("Whatever their political affiliation, moreover, white parents proved unwilling to have their children sit alongside blacks in the classroom."); Nelson, supra note 9, at 135 ("Historians who conclude that most Americans in 1866 favored segregated schools are probably correct in their assessment."); Joel Williamson, After Slavery: The Negro In South Carolina During Reconstruction, 1861-1877, at 216 (1965) ("Native whites were virtually unanimous in their opposition to "mixing' the races in the schools."). Alfred Kelly observed that:

There was comparatively little popular interest in national mixed school legislation. Even in the North most communities were content to allow the issue to be settled as a local or state matter rather than by a federal law. The demand from Negro voters for mixed school legislation, to be sure, was powerful and insistent, .... [but] virtually all southern whites were extremely hostile to school desegregation....

Alfred H. Kelly, The Congressional Controversy over School Segregation, 1867-1875, 64 Am. Hist. Rev. 537, 539 (1959).

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This Part will explore the evidence from the framing of the Fourteenth Amendment and the practices of the time and show that this evidence is far more equivocal than the scholarly consensus suggests. It may come as a surprise to those who have read that there is "virtually nothing" in the historical record to support the "fanciful" claim that the Fourteenth Amendment prohibited segregated education to learn that there was genuine debate and uncertainty about this issue throughout the period. This Part is not intended to establish that the Fourteenth Amendment as originally understood outlawed school segregation, but merely that these aspects of the [*957] history do not conclusively establish the contrary proposition. Parts II and III, which are based on congressional deliberations over the Civil Rights Act of 1875, will make the affirmative case.

A. The Civil Rights Act of 1866 and the Framing of the FourteenthAmendment

As Alexander Bickel found forty years ago, the direct evidence about school segregation in the legislative history of the Amendment, including deliberations over the Civil Rights Act of 1866, is quite scanty. n22 Through the entire course of the debate, there is no explicit affirmation of school desegregation. Historian William Nelson has noted that "the segregation issue simply was not an important one in those debates." n23 More colorfully, John W. Davis, arguing for the State of South Carolina in Brown, told the Supreme Court that "perhaps there has never been a Congress in which the debates furnished less real pablum on which history might feed." n24 The legislative history of the Fourteenth Amendment contains surprisingly little discussion of the meaning of the substantive provisions of Section One, with respect to segregation or anything else. I think this is largely because the framers of Section One of the Fourteenth Amendment employed language ("due process" and "privileges or immunities") that was present in the Constitution in other contexts and that already had reasonably established meanings. n25 But whatever the reason, this sparsity of discussion makes interpretation difficult.

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n22. Bickel, supra note 6, at 56-59.

n23. Nelson, supra note 9, at 135.

n24. Argument of John W. Davis, Esq., on behalf of Appellees R.W. Elliott et al., Brown, in 49A Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 481 (Philip B. Kurland & Gerhard Casper eds. 1975).

n25. See Michael W. McConnell, The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition? 25 Loy. L.A. L. Rev. 1159, 1160-64 (1992).

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Any analysis of the Fourteenth Amendment must begin with its statutory precursor, the Civil Rights Act of 1866. This Act guaranteed to all "citizens, of every race and color" the "same right ... as is enjoyed by white citizens" to make and enforce contracts; to sue, be parties, and give evidence in court; to buy, sell, lease, hold, and inherit both real and personal property; and to receive the full and [*958] equal benefit of laws for the security of person and property. n26 Note that the bill neither forbade racial discrimination generally nor did it guarantee particular rights to all persons. Rather, it required an equality in certain specified rights. If a state provided these rights to its "white citizens," it had to provide the "same right" to all citizens. Moreover, the enumerated rights were of a particular sort and did not include political rights. As explained by Lyman Trumbull of Illinois, who introduced the Act in the Senate, the bill protected "civil liberty," by which he meant that part of "natural liberty" which was left after the creation of civil society. n27 These rights bore a strong resemblance to basic common law rights; although there was no discussion of the point, if pressed the lawyers